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Supreme Court, U.S.
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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

AGUSTIN RHOA-ZAMORA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Board of Immigration Appeals ("Board") violates the Due Process Clause of the Fifth Amendment when it precludes an asylum applicant's rebuttal of administratively noticed facts, which form the sole basis of the Board's denial of the applicant's asylum claim, except by means of a discretionary motion to reopen, which neither (a) gives him the benefit of the Congressionally-mandated "substantial evidence" standard of review (8 U.S.C. § 1105a(a)(4)), nor (b) stays his deportation.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this Petition, Petitioner notes that his appeal to the United States Court of Appeals for the Seventh Circuit from the Board's adverse decision was consolidated for purposes of briefing and disposition with the appeals of Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano (No. 91-1513) and Luis Andres Esquivel-Berrios (No. 91-1551). Esquivel-Berrios has filed a separate Petition for Writ of Certiorari.

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OPINIONS BELOW

The opinion of the Seventh Circuit (as modified in response to Rhoa-Zamora's Petition for Rehearing) is reported at 971 F.2d 26 and is reprinted in the Appendix ("A") hereto at A 1. The Board's decision dismissing Petitioner's administrative appeal is reprinted at A 25. The Immigration Judge's oral decision is printed at A 30. The Immigration Judge's Memorandum of Oral Decision is reprinted at A 45. The Board's decision denying Petitioner's Motion to Reopen is reprinted at A 48.

JURISDICTION

On November 4, 1992, the Seventh Circuit denied a timely Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .

8 U.S.C. § 1158(a) provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted

asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of Section 1101(a)(42)(A) of this title.

8 U.S.C. § 1105a(a)(4) provides in pertinent part:

[T]he petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

8 U.S.C. § 1101(a)(42)(A) provides:

'[R]efugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

28 U.S.C. § 2347(c) provides:

If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that –

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires

> to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

8 C.F.R. § 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . .

STATEMENT OF THE CASE

Petitioner, Agustin Rhoa-Zamora, is a 58-year-old adherent of the Catholic Charismatic revival movement who fled Nicaragua in 1986 to escape religious and political persecution at the hands of the Sandinistas – a Marxist-Leninist party that has effectively ruled Nicaragua since 1979. On Christmas Eve, 1986, Rhoa-Zamora was apprehended by the Immigration and Naturalization Service ("INS") and charged with deportability under Section 241(a)(2) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(2). He conceded deportability, but requested asylum pursuant to Section 208(a) of the INA, 8 U.S.C. § 1158(a).

At his asylum hearing, Rhoa-Zamora testified that he fled his country because of "religious persecution now

against me and my entire family" (Administrative Record ("R") 639), and explained that he feared persecution by the Sandinistas because of his ties to Luis Amado Pena, a well-known Charismatic priest branded a "counter-revolutionary." Nevertheless, the Immigration Judge denied Rhoa-Zamora asylum. (A 45.) Rhoa-Zamora filed a timely notice of appeal with the Board. (R 371.)

On January 31, 1991, the Board dismissed Rhoa-Zamora's appeal. (A 25.) Without advising Rhoa-Zamora of its intent to do so, the Board took administrative notice of the fact that Mrs. Violeta Chamorro, the National Opposition Union candidate, had been elected President of Nicaragua. (A 27.) Relying on that fact alone, the Board concluded that Rhoa-Zamora could not have a well-founded fear of persecution by the Sandinistas:

> [W]e take administrative notice that the Sandinista party no longer controls the Nicaraguan government.
>
> * * *
>
> Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua. (A 27.)

Prior to rendering a final and appealable decision, the Board never provided Rhoa-Zamora an opportunity to rebut the impact of the Chamorro election on his asylum claim.

Shortly after receiving the Board's opinion, Rhoa-Zamora retained new counsel and moved the Board to reconsider pursuant to 8 C.F.R. § 3.2.[1] (R 37-46.) He attached to his Motion to Reopen numerous articles and reports indicating that, despite the Chamorro election, the Sandinistas retained the ability to persecute him. (R 52-354.) While his Motion to Reopen was pending, Rhoa-Zamora filed a Petition for Review with the Seventh Circuit.

On August 4, 1992, the Seventh Circuit – relying on its decision in *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir.), *cert. denied*, 112 S.Ct. 583 (1991) – rejected Rhoa-Zamora's contention that the Board violated due process by taking administrative notice of non-record facts, *i.e.*, Chamorro's election, to deny him asylum. The Court held that Rhoa-Zamora's right to a meaningful opportunity to rebut noticed facts was satisfied by the availability of the administrative motion to reopen mechanism. (A 16.)

Although the Seventh Circuit acknowledged "the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen" (A 19 n.11), it purported to resolve this difficulty by presuming that the Board would "exercise its discretion to stay the execution of its decision until it had an opportunity to rule on the applicant's motion." (A 19 n.11.)

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[1] Although this Motion was styled, "Motion For Reconsideration," the Seventh Circuit subsequently characterized it as a "Motion to Reopen." (A 5 n.1.)

The Court never addressed Rhoa-Zamora's claim that the highly discretionary and disfavored nature of motions to reopen deprived him of a "meaningful opportunity" to rebut the significance of Mrs. Chamorro's election.[2]

On September 15, 1992, Rhoa-Zamora filed a Petition for Rehearing with the Seventh Circuit regarding, *inter alia*, the affirmance of the Board's notice-taking. On November 4, 1992, the Seventh Circuit modified its opinion in response to the Petition for Rehearing, but did not alter its ruling that the reopening procedure afforded Rhoa-Zamora a constitutionally adequate means to rebut administratively noticed facts.

Soon after the Seventh Circuit's decision, the Board denied Rhoa-Zamora's Motion to Reopen. The Board conceded that the documentary evidence presented by Rhoa-Zamora, particularly the affidavit submitted by his expert witness, "confirms that the Chamorro government is

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[2] Although Rhoa-Zamora does not seek review of the substantive merits of the Board's administratively noticed findings, he notes that the United States Department of State recently recognized that the Sandinistas have now taken *de facto* control of the entire Nicaraguan government. *See* Krauss, *U.S. Cooling Toward Sandinistas' Successors*, N.Y. Times, Sept. 3, 1992, § A at 3, col. 1. (recounting State Department criticism of Chamorro government and Senate report "alleging that Mrs. Chamorro was a figurehead manipulated by the Sandinistas"). *See also*, Department of State, *Country Reports On Human Rights Practices for 1991* (Feb. 1992) at 678 (noting that Sandinista-controlled security forces had become "a state within a state"); Republican Staff Report to Committee on Foreign Relations, United States Senate, *Nicaragua Today* (August 1992) at viii ("All real power remains with the Sandinistas . . . ").

under the control of the Sandinistas". (A 49.) Nevertheless, the Board refused to reopen the case.

On November 16, 1992, Rhoa-Zamora filed a second Notice of Appeal with the Seventh Circuit; this time directed to the Board's denial of his Motion to Reopen. That filing stayed his deportation. *See* 8 U.S.C. § 1105a(a)(3). On January 7, 1993, Rhoa-Zamora moved to stay that second appeal pending disposition of this Petition. The INS is opposed to the stay request.

REASONS FOR GRANTING WRIT

The issue before this Court is not whether the Board has the power to take administrative notice of changed political circumstances in other countries; but whether it exercised its administrative notice powers in a manner consistent with the Due Process Clause of the Fifth Amendment by requiring Rhoa-Zamora to rebut the significance of its administratively noticed facts by way of a motion to reopen.

A motion to reopen is a constitutionally inadequate means of challenging administratively noticed facts for two reasons: (A) the Board's decision on a motion to reopen is extraordinarily discretionary and is reviewed by a Court of Appeals under a highly deferential abuse of discretion standard – even though Congress has directed the federal courts to review Board decisions regarding an applicant's eligibility for asylum for "substantial evidence"; and (B) the filing of a motion to reopen does not stay deportation, thereby exposing an asylum applicant who has never had an opportunity to challenge the

noticed facts controlling the Board's decision to an unreasonable risk of deportation.

I. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS BY THE SIXTH AND NINTH CIRCUITS.

The Seventh Circuit's holding irreconcilably conflicts with rulings by the Sixth and Ninth Circuits, both of which have recognized that reopening motions do not provide sufficient due process under these precise circumstances.

In *Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992), the Ninth Circuit, faced with an exercise of notice-taking indistinguishable from that in the case at hand, held that the Board violated the Due Process Clause of the Fifth Amendment by taking administrative notice of the Chamorro election while denying asylum applicants a meaningful opportunity to present evidence concerning that issue prior to its decision. Likewise, in *Ulloa v. INS*, 944 F.2d 905 (6th Cir. 1991) (unpublished decision) (reprinted at A 52), the Sixth Circuit vacated and remanded a similar ruling dismissing a Nicaraguan asylum application for precisely the same reason.[3]

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[3] The Ninth Circuit adhered to its decision in *Castillo-Villagra* in numerous cases. *See, e.g., Garcia-Cruz v. INS*, 1993 WL 993 (9th Cir. Jan. 5, 1993) (unpublished decision); *Roman-Zavala v. INS*, 972 F.2d 1342 (9th Cir. 1992) (unpublished decision); *Sobalbarro-Bravo v. INS*, 972 F.2d 1342 (9th Cir. 1992) (unpublished decision); *Beltran-Espinoza v. INS*, 972 F.2d 1337 (9th Cir. 1992) (unpublished decision); *Castillo-Chavarria v. INS*, 972 F.2d 1337 (9th Cir. 1992) (unpublished decision); *Cerano-Luaciga v. INS*, 972 F.2d 1337 (9th Cir. 1992) (unpublished decision).

The Sixth and Ninth Circuits both expressly rejected the view adopted by the Seventh Circuit, *i.e.*, that motions to reopen provide a constitutionally-sufficient means of refuting the Board's administratively noticed findings, on the ground that relegating applicants to such remedies would effectively provide them with no process at all.

For example, in *Castillo-Villagra*, the Ninth Circuit observed:

> The [Board] decision was made on the basis of facts which were not the subject of the hearing before the [Immigration Judge]. That means that, *with respect to the facts which controlled the [Board] decision, the petitioners have never had a hearing. The motion to reopen is discretionary. If it were denied, the petitioners would never obtain a hearing on the matters which were determinative for the [Board].* The effect of requiring a motion to reopen as a condition of exhaustion may amount, in practical consequences, to *denial of any hearing.*

972 F.2d at 1025 (emphasis added).

Two other circuits, however, have agreed with the Seventh Circuit – and disagreed with the Ninth and Sixth Circuits – that a motion to reopen is a constitutionally adequate means to rebut administratively noticed facts. *See, Rivera-Cruz v. INS*, 948 F.2d 962, 968-69 (5th Cir. 1991); *Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992). This fundamental disagreement among the circuits regarding crucial due process rights creates an intolerable situation. Under the current state of the law, the scope of an asylum applicant's due process rights turns on which

Court of Appeals happens to have jurisdiction over his case.[4]

The Board itself has expressed concern over precisely this type of inter-circuit discord on the nation's immigration laws:

> The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. *We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue.* Here, however, we are left with a patchwork application of the law – with the most profound decisions affecting aliens . . . tied to the *mere happenstance of where their cases arise geographically.*

Matter of Cerna, 1991 WL 353528 (BIA Oct. 7, 1991) at *9 (emphasis added). This Court's resolution of the claims raised by Rhoa-Zamora's petition would eliminate the circuit conflict and make uniform the due process rights available to all aliens – wherever situated.

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[4] *See Immigration Board's Administrative Notice of Sandinista Ouster Yields Circuit Split*, 61 USLW 1023 (Aug. 18, 1992) (noting conflict among the circuits); 69 *Interpreter Releases* 1213 (Sept. 28, 1992) (noting conflict and expressing view that *Castillo-Villagra* represents correct statement of law).

II. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE MOST ELEMENTAL PRINCIPLES OF DUE PROCESS APPLICABLE TO PERSONS FACING DEPORTATION.

"[T]hough deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 30, 50 (1949). Because of the fundamental importance of the interests implicated by deportation, no alien may be deported without the "meaningful opportunity to be heard," *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976), required by the Due Process Clause of the Fifth Amendment:

> [The executive cannot] cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, . . . to be taken into custody and deported without giving him *all opportunity to be heard upon the questions involving his right to be and remain in the United States.*

The Japanese Immigrant Case, 189 U.S. 86, 101 (1903) (emphasis added). *See also, United States Ex Rel. Vajtauer v. Comm'n of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process.").

Due process dictates that an asylum applicant be "allowed an opportunity to rebut officially noticed facts,

particularly when . . . those facts are crucial to – indeed dispositive of – the outcome of the administrative proceeding." *Kaczmarczyk*, 933 F.2d 588, 596 (7th Cir. 1991). In *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292 (1936), Justice Cardozo, speaking for a unanimous Court, reversed an agency decision and allowed the complaining party an opportunity to controvert administratively noticed facts, noting that the failure to afford litigants such an opportunity "will never do if hearings and appeals are to be more than empty forms." *Id.* at 303. *See also Garner v. Louisiana*, 368 U.S. 171, 173 (1961). As this Court noted more recently:

> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that *where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.*'

Goldberg v. Kelly, 397 U.S. 254, 270 (1970) quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (emphasis added).[5]

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[5] *Accord*, 4 Stein, Mitchell, Mezines, *Administrative Law* (1991), § 25.03 ("Due process requires that parties to an agency proceeding be informed that official notice is being taken by the agency and be given an opportunity to present evidence in rebuttal"). *Cf.*, Administrative Procedure Act, § 7(d), 5 U.S.C. § 556(e) ("When an agency decision rests on official notice of a material fact not appearing in the evidence on the record, a party is entitled, on timely request, to an opportunity to show to the contrary"); FED. R. EVID. 201(e) ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed"); 8

In this case, Rhoa-Zamora was denied due process because – *through no fault of his own* – he was not afforded a fair opportunity to respond to the non-record evidence which formed the sole basis of the Board's decision to deny him asylum. The Seventh Circuit too readily accepted the INS's suggestion that Rhoa-Zamora's due process rights were satisfied by the availability of the reopening procedure. This error not only denied Rhoa-Zamora due process, but also stands to violate the due process rights of perhaps thousands of other asylum applicants against whom the Board has invoked its notice-taking powers.

A. A Motion to Reopen is a Constitutionally Inadequate Means to Rebut Noticed Facts Because it is Extraordinarily Discretionary.

The Seventh Circuit's decision conflicts with (and largely ignores) this Court's recent decisions in *INS v. Doherty*, 112 S.Ct. 719 (1992) and *INS v. Abudu*, 485 U.S. 94 (1988) which emphasized the limited scope and "discretionary" nature of motions to reopen. In *Doherty* and *Abudu*, this Court likened the reopening procedure to a petition for rehearing and a motion for a new trial based on newly discovered evidence, emphasizing that such motions are plainly "disfavored," (*Doherty*, 112 S.Ct at 724; *Abudu*, 485 U.S. at 107, 110) and that the party

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C.F.R. § 208.12 (if an adverse asylum or deportation determination by an Asylum Officer rests on certain extra-record material, "that material must be identified and the applicant must be provided with an opportunity to inspect, explain, and rebut the material . . . ").

moving to reopen "bears a heavy burden" (*Abudu*, 485 U.S. at 110).

In *Abudu*, this Court explained that the regulation permitting the filing of motions to reopen, 8 C.F.R. § 3.2:

> 'is framed negatively; it directs the Board not to reopen unless certain showings are made. *It does not affirmatively require the Board to reopen the proceedings under any particular condition.* Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.'

Abudu, 485 U.S. at 105, quoting *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981) (emphasis added). Thus, this Court's prior decisions, "stand for the proposition that the [Board] has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief . . . ". *Abudu*, 485 U.S. at 105-06. *See also, Matter of Coelho*, 1992 WL 195806 (BIA April 30, 1992) at *7-8 (relying on *Doherty* and *Abudu* to illustrate discretionary nature of motion to reopen). The denial of a motion to reopen is, therefore, reviewed only under a deferential abuse of discretion standard. *Doherty*, 112 S.Ct. at 725. *See also, Kaczmarczyk*, 933 F.2d at 597 (reopening motions "governed by an admittedly deferential abuse of discretion standard").

In stark contrast, 8 U.S.C. § 1105a(a)(4) provides that a petition for review of a deportation order shall be determined solely upon the administrative record "and the Attorney General's findings of fact, *if* supported by *reasonable, substantial, and probative evidence* on the record considered as a whole, shall be conclusive." (Emphasis

added.) *See INS v. Elias-Zacarias*, 112 S.Ct. 812, 815 (1992). *See also Melendez v. INS*, 926 F.2d 211, 216-17 (2d Cir. 1991).[6]

Consequently, by deciding a case on administratively noticed facts, rather than on the record evidence, the Board deprives a blameless applicant of the more favorable substantial evidence standard available on review of the underlying deportation order. As a practical matter, the latitude given the Board to deny reopening motions means that an applicant who attempts to rebut noticed facts through a motion to reopen – and manages to submit evidence fully and convincingly refuting the noticed facts – may nonetheless be denied relief.

In the Seventh Circuit, the INS never disputed that the effect of the Board's notice-taking diluted the standard of review, but characterized the difference between "substantial evidence" and "abuse of discretion" review as "small." (Resp. to Cons. Pet. for Reh. at 5.) The INS's effort to trivialize the consequences of notice-taking cannot, however, be reconciled with cases highlighting the very real distinction between the two standards of review.

The "abuse of discretion" standard is "even more deferential than the arbitrary or capricious standard and the requirement of substantial evidence on the record as a whole", and is "about as restrictive [a standard] as the

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[6] While the ultimate award of asylum is a discretionary act, the "threshold finding" of whether an alien has established a well-founded fear of persecution and thus, eligibility for asylum, is a non-discretionary "factual finding" reviewable for substantial evidence. *Melendez*, 926 F.2d at 216-17.

Congress can fashion." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1329 (D.C. Cir. 1989), *vacated on other grounds*, 111 S.Ct. 1068 (1991). *See also, Abbott Lab. v. Gardner*, 387 U.S. 136, 143 (1967) (" 'substantial evidence' test afford[s] a considerably more generous judicial review than the 'arbitrary and capricious' test . . . "); *Jamesway Corp. v. NLRB*, 676 F.2d 63, 67 n.4 (3d Cir. 1982) ("abuse of discretion standard of review . . . entails a greater degree of judicial deference to agency action than does substantial evidence review.").

In any event, as this Court observed in *Addington v. Texas*, 441 U.S. 418 (1979) in connection with analogous standards of proof, "even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a 'standard of proof is more than an empty semantic exercise.' " *Id.* at 425 (citations omitted).

First, "in cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Id.* Accordingly, due regard for the liberty interest of asylum applicants facing deportation cautions against applying a reduced standard of proof in instances where, as here, the Board has opted to rely on a bureaucratic "short-cut".

Second, "*Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455

U.S. 745, 755 (1982). *See also Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) ("The more stringent a party's burden of proof, the more that party bears the risk of an erroneous decision.")

The Board should not be allowed to unilaterally alter Rhoa-Zamora's burden of proof and to shift onto him the risk of an erroneous decision. Such risk-shifting is especially unwarranted here where the applicant is blameless and the need for supplemental evidence is not of his making. As in *Castillo-Villagra*, Petitioner:

> . . . did not bypass the INS. The INS bypassed [him], by taking administrative notice of facts not at issue in the hearing[]. Usually in a motion to reopen, the movant seeks to inject new material, but in this case, the tribunal injected the new material after the hearing was over.

972 F.2d at 1024.

Third, the standard of proof functions "to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). Here, there is no reason to repose confidence in the Board's adjudication. That decision turned on an issue as to which Rhoa-Zamora was not permitted to present evidence, *i.e.*, the significance of the Chamorro election. The Board proceeding thus lacked the participatory and adversarial character that is the hallmark of adjudicative integrity.

Finally, whatever procedural guarantees may be afforded by the Due Process Clause, it is clear that the

discretionary reopening mechanism is an insufficient safeguard of Rhoa-Zamora's constitutional rights because it cannot place him in the position he would have been if the Board had acted in accordance with its constitutional obligation to permit rebuttal of administratively noticed facts. *See* 3 Davis, *Administrative Law Treatise*, § 15.18 at 201 (2d Ed. 1980) (due process satisfied by allowing plaintiff to rebut officially noticed facts only if "his procedural interest is as fully protected as it would have been by introducing the noticed facts as a part of the evidence at the original hearing"); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (remedy for constitutional violation must be "designed as nearly as possible 'to restore the victims . . . to the position they would have occupied in the absence of such conduct' ") (citation omitted).

The reopening procedure may be constitutionally adequate when invoked by an applicant for presenting newly discovered evidence which, although bearing on the applicant's claims, was not submitted prior to the initial disposition of his case. When the reopening procedure is used for *that* purpose, it is understood that the initial decision – although made without the benefit of the newly uncovered evidence – arose in an open and adversarial setting and is, therefore, at least presumptively reliable. Where constitutional rights have not been observed in the first instance, however, and where the basis of the agency's decision was, in effect, hidden from the petitioner, requiring him to resort to a wholly discretionary procedure to vindicate those rights is *not* "consistent with the interest of giving the adversaries a fair opportunity to present their respective cases." *Abudu*, 485 U.S. at 107. "The vindication of rights guaranteed by the

Constitution has never been made to turn on the unreviewable discretion of . . . an administrative tribunal." *Herrera v. Collins*, No. 91-7328, 1993 U.S. LEXIS 1017 *82 (Sup. Ct. Jan. 25, 1993) (Blackmun, J. dissenting). *See also Solem v. Helm*, 463 U.S. 277, 303 (1983).

In reviewing the decision below, this Court need not devise a new constitutional remedy. Instead, the Court may order the Seventh Circuit to accord Rhoa-Zamora the statutory relief authorized by 28 U.S.C. § 2347(c), under which the Board would be required to consider his newly-adduced evidence if that evidence is "material" and "there were reasonable grounds for failure to adduce the evidence before the agency." 28 U.S.C. § 2347(c). Alternatively, the Court could hold that the Board's decision on a motion to reopen directed to rebutting administratively noticed facts must be reviewed for substantial evidence and must stay the asylum applicant's deportation. Finally, the Court could hold that due process requires the Board to inform an asylum applicant of its intention to take administrative notice of facts and to provide the applicant with an opportunity to be heard on those facts *before* the Board reaches its decision or before that decision becomes final and appealable. At a minimum, however, the substantial evidence standard of review that Congress mandated must be preserved.

B. A Motion to Reopen is a Constitutionally Inadequate Means to Rebut Noticed Facts Because the Filing of Such a Motion Does Not Stay Deportation.

Limiting an asylum applicant to a discretionary motion to reopen also violates due process "because the

agency might have denied it, and deportation would not have been automatically stayed by the motion." *Castillo-Villagra*, 972 F.2d at 1029. *See* 8 C.F.R. § 3.8(a) ("The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case.").

The Seventh Circuit recognized this problem during oral argument and sought assurances from INS counsel that Rhoa-Zamora would not be deported during the pendency of his Motion to Reopen. The INS *refused* to provide such assurances. Yet, despite this refusal, the Court purported to resolve the problem by simply "reiterat[ing] here [its] presumption that 'when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion.' " (A 19 n.11) (quoting *Kaczmarczyk*, 933 F.2d at 597).

The Sixth and Ninth Circuits have refused to take this leap of faith. *See Castillo-Villagra*, 972 F.2d at 1030 ("We are not satisfied that we can make [the] presumption [made in *Kaczmarczyk*], in view of the 'broad discretion' the agency has to deny motions for rehearing . . . ".). The Sixth Circuit explained:

> [R]equiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an *unnecessary procedural hurdle* for such a petitioner. The filing of a motion to reopen does not serve to stay the execution of an order of deportation, see 8 C.F.R. § 3.8(a), and thus such a procedure imposes the unreasonable risk that a petitioner

> may be deported before the Board considers the rebuttal evidence contained in his motion to reopen.

(A 56 n.1) (emphasis added). An asylum applicant's due process rights should not be left to the mercy of an opponent who could lawfully "moot out" an applicant's motion "by deporting the applicant before ruling." *Castillo-Villagra*, 972 F.2d at 1030.

The INS has characterized Rhoa-Zamora's concerns regarding the risk of deportation as "a fear and a speculation." (Resp. to Cons. Pet. for Reh. at 3.) That fear, however, as evidenced by the INS's refusal to promise that Rhoa-Zamora would not be deported during the pendency of his Motion to Reopen, is far from speculative. In 1988, for example, Gerald S. Hurwitz, then Counsel to the Director of the Executive Office for Immigration Review, admitted that aliens are "not infrequently" deported during the pendency of motions to reopen. Telephone Interview with Gerald S. Hurwitz, quoted in Note, *Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act*, 86 Mich. L. Rev. 990, 997 n.36 (April 1988). *See also* 69 *Interpreter Releases* 1394, 1396 (Nov. 2, 1992) (noting that "the INS has not hesitated to execute orders of deportation during the pendency of" motions to reopen); *Martinez-Cabrera v. Thornburgh*, CA No. B-89-126 (S.D. Tex. Oct. 5, 1989) (reported in 66 *Interpreter Releases* 1202 (Oct. 30, 1989)) (noting the INS's deportation of asylum applicant whose motion to reopen had actually been granted). No one in Rhoa-Zamora's shoes could comfortably assume that he will not be forcibly removed from this country before he has had a fair and full opportunity to meet the case against him.

III. THE DUE PROCESS RIGHTS OF THOUSANDS OF ASYLUM APPLICANTS ARE THREATENED BY LIMITING THEIR OPPORTUNITY TO REBUT NOTICED FACTS TO THE REOPENING PROCEDURE.

The end of the Cold War wrought dramatic changes in the world political landscape. Rhoa-Zamora's case is but one instance in a developing pattern in which the Board has reacted to such political realignment by invoking its administrative notice powers. In brief, boilerplate opinions replicated across the country, and affecting potentially thousands of putative refugees, the Board has taken official notice of changed political conditions in asylum applicants' home countries and relied on those changed conditions to deny the asylum claims of all applicants from those countries.[7] With a few strokes of a word processor key, entire categories of cases are summarily removed from the Board's docket by a mechanism whose constitutionality has never been tested by this Court and with respect to which there is a serious and

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[7] *See, e.g., Tokarska v. INS*, 978 F.2d 1 (1st Cir. 1992) (Poland); *Kontrol v. INS*, 978 F.2d 1265 (9th Cir. 1992) (unpublished decision) (Romania); *Kindl v. INS*, 977 F.2d 595 (10th Cir. 1992) (unpublished decision) (Czechoslovakia); *Osuch v. INS*, 970 F.2d 394 (7th Cir. 1992) (Poland); *Roman-Zavala v. INS*, 972 F.2d 1342 (9th Cir. 1992) (unpublished decision) (Nicaragua); *Chaves-Robles v. INS*, 966 F.2d 1441 (4th Cir. 1992) (unpublished decision) (Nicaragua); *Baka v. INS*, 963 F.2d 1376 (10th Cir. 1992) (Hungary); *Gutierrez-Rogue v. INS*, 954 F.2d 769 (D.C. Cir. 1992) (Nicaragua); *Rivera-Cruz v. INS*, 948 F.2d 962 (5th Cir. 1991) (Nicaragua); *Wojcik v. INS*, 951 F.2d 172 (8th Cir. 1991) (Poland); *Kapcia v. INS*, 944 F.2d 702 (10th Cir. 1991) (Poland); *Janusiak v. INS*, 947 F.2d 46 (3rd Cir. 1991) (Poland).

widespread dispute among the circuits. Continuing changes in Eastern Europe, Central America and Asia make more such decisions inevitable and make the necessity for this Court's review of the process all the more imperative.

Administrative notice may be a bureaucratically attractive means by which to quickly reduce the Board's caseload. "Casual reliance" on noticed facts, *Castaneda-Hernandez v. INS*, 826 F.2d 1526, 1530 n.5 (6th Cir. 1987), however, threatens to turn administrative notice "into a pretext for dispensing with a trial." *Ohio Bell*, 301 U.S. at 302. "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when [the rudiments of fair play have] been neglected or ignored." *Id.* at 305. *See also, Castillo-Villagra*, 972 F.2d at 1027 ("[T]he administrative desirability of notice as a substitute for evidence cannot be allowed to outweigh fairness to individual litigants.").

IV. THE PUBLIC INTEREST IN PROMPT AND ACCURATE ADJUDICATION OF ASYLUM CLAIMS IS COMPROMISED BY THE SEVENTH CIRCUIT'S DECISION.

Requiring asylum applicants to resort to an after-the-fact discretionary reopening procedure to challenge noticed facts wastes scarce administrative and judicial time and resources. Indeed, the procedural history of this case perfectly illustrates the inefficiencies of the procedure endorsed by the Seventh Circuit. At this moment,

Rhoa-Zamora's *second* appeal is pending before the Seventh Circuit. That appeal was necessitated by the Board's denial of Rhoa-Zamora's Motion to Reopen.

In order to comply with the Seventh Circuit's holding in this case, an asylum applicant seeking to rebut noticed facts must file a motion to reopen. However, in order to preserve his right to appeal from the final order of deportation, an applicant must *also* file a notice appealing the Board's denial of his claim. This latter filing is necessary because the filing of a motion to reopen does not toll the period for filing a notice of appeal. (A 15.) In the event the Board exercises its discretion to deny his motion to reopen, the applicant will likely turn once again to the court of appeals to secure his right to respond to the noticed facts, thus spawning a second appeal in the same case. Such a fragmented approach to asylum adjudication is contrary to the "strong public interest in bringing [asylum] litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *Abudu*, 485 U.S. at 107.

The Seventh Circuit's decision has a further negative consequence for the adjudicative process; it virtually assures that judicial review will be made on inadequate administrative records. Under the procedure approved by the Seventh Circuit, asylum applicants may refute facts administratively noticed by the Board only after a final, appealable decision has been rendered by the Board. Then, asylum applicants may do so only by way of a

discretionary procedure – the motion to reopen. Consequently, reviewing courts are forced to test the accuracy of asylum determinations which turn on noticed facts *without the benefit of evidence that those facts are untrue or irrelevant.*

Again, Rhoa-Zamora's case illustrates this predicament. Rhoa-Zamora has significant evidence indicating that the foundation of the Board's decision – the assumption that the Chamorro election vitiated any reasonable fears of persecution by the Sandinistas – is simply wrong. The Seventh Circuit would not consider that evidence, however, because it was not part of the evidence before the Board at the time the Board rendered its decision. (A 17.) ("We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."). Because the Board engaged in fact-*noticing* rather than fact-*finding*, Rhoa-Zamora's evidence was not part of the record and was not considered by the Seventh Circuit.

The Seventh Circuit, which has lamented the often sorry state of administrative records in asylum cases (*see Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991)), has contrived a system where it will inevitably be made to review noticed facts without a proper record. By contrast, allowing the party against whom notice is taken to respond before a final and appealable decision is reached insures that:

> [A] clear and complete record will be available on the issue for purposes of appeal. The appellate court will not have to speculate on whether there exists any information which raises a

> doubt concerning the accuracy of the judicially noticed fact.

Turner, *Judicial Notice and Federal Rule of Evidence 201*, 45 U. Pitt. L. Rev. 181, 205 (1983).

Further, permitting asylum applicants to make their rebuttal evidence part of the record before final adjudication, not only facilitates judicial review, but also helps ensure more accurate adjudications in the first instance.

> '[A] noticed fact . . . may actually be wrong. Or, as is far more likely . . . there may be room for reasonable disagreement concerning the significance of the facts which are noticed, and the deductions to be drawn from them . . .
>
> * * *
>
> The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies.'

Kaczmarczyk, 933 F.2d at 596 n.7, quoting *Report of the Attorney General's Committee on Administrative Procedures in Government Agencies*, 71-73 (1941) cited in 4 Stein, *Administrative Law*, § 25.01 n.7 (1986).

Judges make law on the basis of facts proved and assumed, and it is fundamental that "[t]hey are more likely to do a better job when their assumptions rest on information rather than a hunch." Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75. "[T]he doctrine of judicial notice must be intelligently used, lest the court assume that something false be true, or that

half-truths be whole." Keefe, Landis & Shaad, *Sense and Nonsense about Judicial Notice*, 2 Stan. L. Rev. 664, 665 (1950).

CONCLUSION

Properly utilized, administrative notice allows an agency "to actively participate in the litigation to further the discovery of the truth and the accomplishment of a just result – the ultimate objectives of the adversary system." Comment, *The Presently Expanding Concept of Judicial Notice*, 13 Vill. L. Rev. 528, 551 (1968). However, "facts disputable literally must not be made indisputable procedurally." *Id.* at 546.

Because Petitioner was denied a fair opportunity to meet the case against him in violation of due process, and because of the importance of the question presented and the irreconcilable conflict among the circuits on the issue, Petitioner requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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February 2, 1993

Agustin RHOA-ZAMORA, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Felipe Antonio JURESMA-ALTAMIRANO and Luis Rodriguez-Altamirano, Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Luis Andres ESQUIVEL-BERRIOS, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Nos. 91-1949, 91-1513 and 91-1551.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 11, 1992.

Decided Aug. 4, 1992.

As Modified on Denial of Rehearing and Rehearing En Banc Nov. 4, 1992.

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Lori L. Scialabba, David J. Kline, Charles E. Pazar, Robert Kendall, Jr., Donald E. Keener (argued), Dept. of

Justice, Office of Immigration Litigation, Robert L. Bombaugh, I.N.S., Civ. Div., Washington, D.C., Richard L. Thornburg, U.S. Atty. Gen., Office of U.S. Atty. Gen., Washington, D.C., A.D. Moyer, Samuel Der-Yeghiayan, Ellen J. Krupp, I.N.S., Fred Foreman, U.S. Atty., Crim. Div., Chicago, Ill., for I.N.S.

James T. Barry, III (argued), Foley & Lardner, Milwaukee, Wis., Randall S. Rapp, Foley & Lardner, Chicago, Ill., for petitioners Felipe Juaresma-Altamirano and Louis Rodriguez-Altamirano.

Roy A. Petty, Midwest Immigrant Rights Center, Travelers and Immigrants Aid, Javier H. Rubinstein (argued), Mayer, Brown & Platt, Chicago, Ill., for petitioner Luis A. Esquibel-Berrios [sic].

Before CUDAHY and RIPPLE, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

CUDAHY, Circuit Judge.

The petitioners in these consolidated appeals are Nicaraguan nationals who fled Nicaragua while the Sandinistas were in power and subsequently sought asylum in this country. All four petitioners were denied asylum by an Immigration Judge and appealed to the Board of Immigration Appeals (the Board). In each case, the Board took administrative notice that, as of April 1990, "the Sandinista party no longer controls the Nicaraguan government" and concluded that, "under the present circumstances," the record did not support a finding that the petitioner had "a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua." Petitioners claim that the Board

erred in finding that they did not have a well-founded fear of persecution because of the change in the Nicaraguan government. They also contend that the Board violated their rights to due process by failing to accord each petitioner an individualized determination of his claim. In addition, petitioner Zamora argues that the Board deprived him of due process by failing to give him an opportunity to rebut the noticed facts. Petitioners therefore ask this court either to reverse the Board's decisions or to grant their motions to adduce additional evidence under 28 U.S.C. § 2347(c) and "remand these proceedings to the [Board] for further consideration" in light of that evidence.

I. FACTS

A. *Agustin Rhoa-Zamora*

Agustin Rhoa-Zamora entered the United States illegally on December 24, 1986. He was apprehended by the Immigration and Naturalization Service (INS) and charged with deportability under 8 U.S.C. § 1251(a)(2). Zamora conceded deportability, but requested asylum pursuant to 8 U.S.C. § 1158(a) and withholding of deportation pursuant to 8 U.S.C. § 1253(h). To be eligible for asylum, an alien must establish that he meets the statutory definition of "refugee," which requires him to show either past persecution or a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1101(a)(42)(A). The decision whether to grant asylum to a statutorily eligible alien is within the discretion of the Attorney General. *INS v. Stevic*, 467 U.S.

407, 423 n. 18, 104 S.Ct. 2489, 2497 n. 18, 81 L.Ed.2d 321 (1984). Withholding of deportation, by contrast, is mandatory if the applicant can meet the higher standard of showing a "clear probability" of persecution on account of one of these five grounds if he were returned to his country. *Id.* at 421 n. 15, 104 S.Ct. at 2496 n. 15.

At his deportation hearing, Zamora testified that he fled Nicaragua because of religious persecution directed at him and his family. He claimed that he was an adherent of the Charismatic Catholic revival movement and described numerous incidents of Sandinista violence against him and other members of his faith. The Immigration Judge rejected Zamora's testimony as neither "candid" nor "credible" and concluded that Zamora had established neither a "clear probability that he would be subject to persecution upon return to Nicaragua" nor a well-founded, subjective fear of persecution. The judge therefore denied his application for asylum and ordered him to depart the country within two months.

Zamora appealed to the Board. While the appeal was pending, national elections were held in Nicaragua and a new coalition government made up of parties opposed to the Sandinistas was voted into office. On January 31, 1991, the Board issued a written opinion dismissing Zamora's appeal. Without prior notice to Zamora, the Board took administrative notice of the change in government in Nicaragua and concluded that, since the Sandinista party no longer governs Nicaragua, Zamora did not have a well-founded fear of persecution by the Sandinista government should he return. The Board ordered Zamora to depart within thirty days.

On April 25, 1991, Zamora filed with the Board a motion to reopen the proceeding pursuant to 8 C.F.R. § 3.2.[1] In support of his motion, Zamora submitted various materials allegedly evincing the Sandinistas' continuing ability to persecute him. The Board has not, to this date, ruled on the motion. On April 26, 1991, Zamora filed a petition for review of the Board's order in this court. The Board certified the administrative record and relinquished it to this court for purposes of that appeal.

B. *Luis Esquivel-Berrios*

Luis Esquivel-Berrios fled Nicaragua in February of 1985 at the age of thirteen. He went first to Honduras and then to Guatemala, where he remained for three and one-half years before entering the United States in July of 1988. On July 21, 1988, Berrios was arrested by the INS and charged with deportability. Like Zamora, Berrios

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[1] Zamora describes this motion as a "motion to reconsider." 8 C.F.R. § 3.2 provides for both motions to reconsider and motions to reopen. 8 C.F.R. § 3.8 prescribes the form for each type of motion as follows:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

We think it clear that Zamora's motion is more accurately characterized as a motion to reopen than as a motion to reconsider, and we will therefore treat it as such throughout this opinion.

In a filing with this court dated October 26, 1992, Zamora's counsel has provided a decision by the Board, dated September 23, 1992, about two pages in length, denying Zamora's motion.

conceded deportability but sought either asylum or withholding of deportation.

As his hearing, Berrios testified that he had left Nicaragua because he feared being forcibly conscripted into military service by the Sandinista government. He testified that in February of 1985 it was common in his village for twelve- and thirteen-year-old boys to be taken into military service, and that he personally knew of other twelve- and thirteen-year-old boys who had been kidnapped and conscripted. Berrios also testified that he was politically opposed to the Sandinista government, and that he remains a conscientious objector to any form of military service in light of his firmly-held religious and moral beliefs. He testified that he believed that if he were returned to Nicaragua he would be either shot or jailed by Sandinista government because of his decision to avoid conscription.

The Immigration Judge found that Berrios' testimony was credible, but nonetheless concluded that Berrios had not met his burden of showing that he was eligible for asylum or withholding of deportation. The judge noted that the Board of Immigration Appeals has long adhered to the position that "it is not persecution for a country to require military service of its citizens." Although there are exceptions to this rule, the judge concluded that this case did not fit within any such exception. He found no objective evidence of record that Nicaragua recruits twelve- or thirteen-year-olds into military service. Further, the judge noted that Berrios could certainly be required to serve in the Nicaraguan military if returned there at present, and could be convicted of a crime and jailed if he refused to do so. Finally, the judge found no

objective evidence that Berrios would receive disproportionate treatment for his previous decision to avoid conscription. The Immigration Judge therefore denied Berrios' application for asylum or withholding of deportation and ordered that he be deported. The Board affirmed this decision based on the April 1990 change of government in Nicaragua, again without prior notice to the petitioner. Berrios did not file a motion to reopen or reconsider but appealed directly to this court.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

Half-brothers Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano (the Altamiranos or the Altamirano brothers) entered the United States illegally on October 26, 1983. They were arrested by INS officials four days later and charged with deportability. Like the other petitioners in this case, the Altamiranos conceded deportability but sought asylum and withholding of deportation.

The Altamiranos testified before the Immigration Judge that they fled Nicaragua in order to avoid recruitment into the Sandinista army. They testified that they are Pentecostal Christians, as are the other members of their family, and that the Pentecostal religion forbids its members to participate in any service requiring the carrying of arms.[2] The brothers also described various threats

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[2] Although it is not relevant to our decision here, we note that the Supreme Court has recently cast considerable doubt on whether these allegations, even if true, can support a

of persecution made against them for adhering to their religious convictions, including statements by military authorities that they would be imprisoned for at least five years if they refused to serve in the military.

The Immigration Judge accepted the brothers' testimony, but found that they had not established a well-founded fear of persecution based on their religious beliefs because they offered no evidence that they had ever requested exemption from military service based on those beliefs.[3] The judge also noted that the brothers did not claim religious persecution, in general, by the Sandinistas. The judge concluded that the brothers had failed to establish that they would be singled out or systematically persecuted because of their religious beliefs. He therefore denied their applications for asylum or withholding of deportation and granted voluntary departure.

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well-founded fear of persecution on account of religion. In *INS v. Elias-Zacarias*, ___U.S.___, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992), the Court held that a guerrilla organization's attempt to conscript the asylum applicant into its military forces does not necessarily constitute persecution on account of political opinion. Based on that decision, the Court vacated and remanded the Ninth Circuit's decision in *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), which held, *inter alia*, that petitioners who would be imprisoned in their native country for refusing to serve in the military based on their religious beliefs had established a "clear probability of persecution on account of religious beliefs." 902 F.2d at 717, vacated and remanded, *INS v. Canas-Segovia*, ___ U.S. ___, 112 S.Ct. 1152, 117 L.Ed.2d 401 (1992).

[3] In fact, Luis testified that he had served in the Nicaraguan army in 1980 and in 1981, although he had been a Pentecostal Christian all of his life.

The Board affirmed this decision based on the intervening change of government in Nicaragua, without prior notice to the Altamiranos, and ordered the brothers to depart within thirty days. The Altamiranos did not file a motion to reopen or reconsider but appealed directly to this court.

II. ANALYSIS

A. *Agustin Rhoa-Zamora*

1. *Jurisdiction*

The INS argues that this court has no jurisdiction over Zamora's petition because his motion to reopen is still pending before the Board, so that he has failed to exhaust his administrative remedies as required by 8 U.S.C. § 1105a(c). In support of this position, the INS cites the Sixth Circuit's decision in *Dokic v. INS*, 899 F.2d 530 (6th Cir. 1990). In *Dokic*, the court held that an applicant for asylum cannot obtain judicial review of an order of deportation until he has exhausted his administrative remedies "by filing a motion to reopen." *Id.* at 532. Presumably, this rule would also require the petitioner to wait until the motion was denied before seeking appellate review of the Board's order.

We disagree with the Sixth Circuit's interpretation of the exhaustion requirement. Section 1105a(c) provides:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him *as of right* under the immigration laws and regulations. . . .

(emphasis added). As Zamora points out, reopening is a discretionary remedy, not one available as a right. *INS v. John Ha Wang*, 450 U.S. 139, 143, 101 S.Ct. 1027, 1030, 67 L.Ed.2d 123 (1981); Note, *Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act*, 86 Mich.L.Rev. 990, 1011 (1988). Further, it would be a waste of time and administrative resources to require petitioners to file a motion to reopen in those cases, such as *Dokic* itself, in which they do not claim to have any new evidence, but wish to challenge the Board's decision on the existing administrative record. Such a rule is therefore contrary to the strong policy interest in preventing the use of frivolous motions to reconsider or reopen in order to postpone the execution of deportation orders. *Pierre v. INS*, 932 F.2d 418, 421 (5th Cir.1991); Note, *supra*, at 1012-13. This court has routinely reviewed Board decisions ordering deportation in cases where the petitioner did not file a motion to reopen. *See, e.g., Zulbeari v. INS*, 963 F.2d 999 (7th Cir. 1992); *Osaghae v. INS*, 942 F.2d 1160 (7th Cir. 1991); *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 583, 116 L.Ed.2d 608 (1991). We see no reason to change that approach.

We are more concerned, however, with another jurisdictional issue that Zamora's pending motion to reopen creates. The Ninth and Eleventh Circuits hold that a motion to reopen deportation proceedings following the Board's affirmance of an immigration judge's deportation order renders the Board's decision nonfinal, and therefore non-appealable. *Fleary v. INS*, 950 F.2d 711 (11th Cir. 1992); *Chu v. INS*, 875 F.2d 777 (9th Cir. 1989); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert.*

denied, 467 U.S. 1216, 104 S.Ct. 2659, 81 L.Ed.2d 366 (1984). The Third Circuit, on the other hand, holds that a pending motion to reopen "does not render the order of deportation nonfinal." *Alleyne v. INS*, 879 F.2d 1177, 1181 (3d Cir. 1989).

In administrative law generally, there appears to be a strong presumption that, with respect to judicial review, the filing of a motion to reopen or reconsider renders an agency's decision nonfinal for purposes of determining when the time to appeal begins to run. *Interstate Commerce Comm'n v. Locomotive Engineers*, 482 U.S. 270, 284-85, 107 S.Ct. 2360, 2369, 96 L.Ed.2d 222 (1987); *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218 (7th Cir. 1986). The majority of courts follow this approach despite the Administrative Procedure Act's provision that agency action that is "otherwise final" is final for purposes of review "whether or not" a motion for reopening or reconsideration has been filed. 5 U.S.C. § 704. As the Supreme Court has noted, this provision "has long been construed . . . merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." *Locomotive Engineers*, 482 U.S. at 284-85, 107 S.Ct. at 2369 (emphasis in original).[4] In *Locomotive Engineers*, the Court placed its imprimatur on this interpretation. *Id.*

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[4] The legislative history of section 704 supports this interpretation. *See West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581, 585 (3d Cir. 1988).

In the wake of *Locomotive Engineers*, several circuits have taken the next logical step of holding that if the filing of a motion to reopen renders an agency decision nonfinal for purposes of determining the time for appeal, it must also render that decision nonfinal for purposes of appellate jurisdiction. *See United Transp. Union v. Interstate Commerce Comm'n*, 871 F.2d 1114 (D.C.Cir. 1989); *West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581 (3d Cir. 1988); *Winter v. Interstate Commerce Comm'n*, 851 F.2d 1056, 1062 (8th Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 308, 102 L.Ed.2d 327 (1988).[5] In *Chu v. INS*, the Ninth Circuit applied this rule in the context of deportation proceedings, concluding that there was "no principled basis upon which to distinguish Chu's case from *Locomotive Engineers* and its progeny." 875 F.2d at 781.

We disagree with the Ninth Circuit's conclusion. In *West Penn Power*, the Third Circuit began its analysis of the effect of a motion to reopen on an order of the EPA by observing that "[i]t makes sense to define 'finality' under the Clean Air Act in the same way that it is defined in

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[5] In *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986), this court held that the pendency of a motion to reopen or reconsider has no effect on an appellate court's jurisdiction. *Id.* at 378. That holding relied explicitly on the opinion of then-Judge Scalia in *American Trucking Ass'n. Inc. v. Interstate Commerce Comm'n*, 697 F.2d 1146, 1148 n. * (D.C.Cir. 1983). The Supreme Court's decision in *Locomotive Engineers*, however, casts serious doubt on the continuing viability of *American Trucking* and its progeny. *West Penn Power*, 860 F.2d at 587. But we need not resolve this issue here, given our conclusion that the rule of *Locomotive Engineers* does not apply in the immigration context, whatever its effect on administrative law generally.

administrative law generally." 860 F.2d at 584. It does not necessarily make sense, however, to define "finality" under the INA in the same way it is defined in administrative law generally. In fact, there are good reasons not to apply the *Locomotive Engineers* rule to deportation proceedings. That rule "basically rest[s] on a notion of judicial economy." *Arch Mineral Corp.*, 798 F.2d at 219. "It is obviously wasteful of the resources of the courts to burden them with objections to administrative action which may be obviated by agency action on reconsideration." *Id.*; *see also West Penn Power*, 860 F.2d at 585 ("allowing a petitioner to apply to both the court and the agency at the same time[] . . . could only lead to waste of resources on the part of the agency, the court, or both, without any countervailing benefit").

In the immigration context, however, efficient use of judicial resources is secondary to a different goal: preventing the use of "dilatory tactic[s] to postpone the execution of deportation orders." *Alleyne*, 879 F.2d at 1180; *see also Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992) (electing to exercise jurisdiction over appeal where petitioner filed motion to reopen *after* seeking appellate review, on ground that "the potential for abuse of the process to circumvent the BIA's discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency"). Application of the *Locomotive Engineers* rule on finality would "directly contravene" that goal. *Alleyne*, 879 F.2d at 1180. Under the INA, deportation is available only "[w]hen a *final order* of deportation under administrative processes is made against any alien." 8 U.S.C. § 1252(c) (emphasis added). Thus, if the filing of a motion to

reopen or reconsider destroyed the finality of the Board's order, that motion might delay deportation so long as it was pending.[6] Moreover, under the Ninth Circuit's scheme an alien who filed such a motion within the statutory period for appeal could further delay deportation if the motion was denied by petitioning for judicial review both of the Board's initial order and of the denial of the motion, thereby obtaining an automatic stay of deportation. 8 U.S.C. § 1105a(a)(3). Such a result is clearly contrary to Congress' intent in enacting the INA.[7]

Finally, we note that the INS regulations providing for motions to reopen or reconsider do not seem to contemplate such a result. Rather, the regulations appear to

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[6] Such a result would also seem to conflict with INS regulations, which provide that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decisions made in the case." 8 C.F.R. § 3.8(a) (1988).

[7] In 1990, Congress amended section 1105a by adding a provision that recognizes the availability of motions to reopen or reconsider:

> [W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with review of the order.

8 U.S.C. § 1105a(a)(6) (1990 Supp.). The Eleventh Circuit has interpreted this provision as "follow[ing] the contours of the Ninth Circuit decisions" regarding the effect of a motion to reopen or reconsider on the finality of a Board order. *Fleary*, 950 F.2d at 713. This court, however, has concluded that the Eleventh Circuit's rule is "incompatible with the plain language of" the provision. *Akrap v. INS*, 966 F.2d 267, 271 (7th Cir. 1992). Thus, the 1990 amendment to the INA actually supports our decision here.

assume that such motions may be pending at the same time the Board's order is being appealed:

> Motions to reopen or reconsider shall state whether the validity of the order has been *or is* the subject of any judicial proceeding.

8 C.F.R. § 103.5a (emphasis added). We conclude that the pendency of a motion to reopen or reconsider an order of deportation does not render the order nonfinal for purposes of this court's jurisdiction. We have jurisdiction over Zamora's case.

2. *Due Process*

Zamora contends that the Board deprived him of due process by failing to accord him a sufficiently individualized determination of his claims. Zamora is certainly correct that the Board is required to "engage in a careful, individualized review of the evidence presented in [his] application[] and hearing[]." *Kaczmarczyk*, 933 F.2d at 595. Further, we agree with Zamora that the Board's disposition of these cases in three opinions employing identical, "boilerplate" paragraphs regarding the effect of the Nicaraguan election casts a cloud over the Board's decisions and hinders meaningful judicial review. We are also aware, however, that "agency action is entitled to a presumption of regularity," so that "the burden is on the petitioner[] to convince us that the [Board] have short shrift to the evidence [he] presented." *Id.* The Board's written decision, which describes in some detail Zamora's testimony regarding his alleged reasons for fearing persecution, demonstrates that the Board did consider Zamora's particular evidence, at least to a degree.

Although the Board apparently based its decision solely on the change of government in Nicaragua, without any examination of how that change related to Zamora's particular claims, the Board's consideration of his case was not so deficient as to constitute a denial of due process.

Zamora also argues that he was deprived of due process because he was not given an opportunity to rebut the Board's conclusion as to the significance of the Nicaraguan elections. This argument is without merit. In *Kaczmarczyk*, this court made clear that due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts prior to reaching a decision. Rather, we found that the mechanism of the motion to reopen, which "allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts," provides a sufficient opportunity to be heard to satisfy the requirements of due process. *Id.* at 597. *Accord Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C.Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968-69 (5th Cir. 1991), *rehearing denied*, 954 F.2d 723 (1992). *But see Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992); *Ulloa v. INS*, 944 F.2d 905 (6th Cir. 1991) (unpublished disposition). *Cf. Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991). As discussed above, Zamora has in fact filed such a motion. The Board did not deprive Zamora of his right to due process.[8]

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[8] We do note that in order for the motion to reopen procedure to satisfy the requirements of due process it must provide a " *'meaningful* opportunity to be heard.' " *Kaczmarczyk*, 933 F.2d at 595 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976)) (emphasis added). Thus, as the D.C. Circuit recently recognized, it would raise a serious

3. *Substantial Evidence*

Zamora also contends that the Board's decision denying him asylum was not supported by substantial evidence because, contrary to the Board's assumption, the change in government in Nicaragua did not significantly diminish the ability of the Sandinistas to persecute him. He argues that the regime headed by President Violeta Chamorro is unstable and that the Sandinistas still wield significant power. This argument rests *entirely* on evidence that Zamora submitted in support of his motion to reopen and his motion to this court for leave to adduce additional evidence. None of this evidence was before the Board at the time it made its determination in Zamora's case. We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance. *See Osaghae*, 942 F.2d at 1162 ("we are not to take evidence and base our decision on some mixture of that evidence with the evidence that was before the Board"); *Rivera-Cruz*, 948 F.2d at 967 ("we cannot weigh evidence that has not been brought previously before the Board"); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994, 102 S.Ct. 2280, 73 L.Ed.2d 1291 (1982) ("this Court does not sit as an administrative agency for the purpose of fact-finding in the first instance"). The

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due process problem if the Board did not actually consider these motions but simply filed them away in some obscure nook or cranny until the petitioner in question could be deported. *See Gutierrez-Rogue*, 954 F.2d at 773. So far as we can tell from this record, however, this is not such a case; the Board's delay in deciding Zamora's motion does not seem attributable to any improper action by the Board. *See infra* p. 35.

evidence that *was* before the Board – that the Sandinistas had ceased to control the Nicaraguan government – tends to support its decision.

Nor will we order the Board to consider Zamora's new evidence, as he alternatively requests. In *Osaghae*, we held that "if the administrative record is inadequate because the Board has failed without justification to consider newly discovered evidence, we can remand for the creation of an adequate record" pursuant to 28 U.S.C. § 2347(c). 942 F.2d at 1162. Here, the fact that the Board has not yet decided Zamora's motion to reopen does not necessarily mean that the Board has "failed without justification" to consider Zamora's evidence with respect to the weakness of the Chamorro regime. A delay of more than a year in deciding a motion to reopen, while certainly significant, does not compel the conclusion that the Board has acted improperly. We can accept the INS's claim that the delay is a normal consequence of the INS's "staggering" caseload. Br. at 24. Further, we note that Zamora's petition to reopen was filed only one day before he petitioned for review in this court. Thus the Board's delay may also be attributable to a decision not to waste limited resources resolving a motion that might well be rendered moot by this court.

The *Osaghae* ruling itself is limited to situations in which the Board "has acted improperly" in preventing an asylum petitioner from placing evidence before it. 942 F.2d at 1162. By its own terms, however, section 2347 apparently permits us, as a matter of discretion, to remand to an agency for new evidence when two conditions are met: that the additional evidence is material, and that there were reasonable grounds for failure to

adduce the evidence before the agency.[9] But whatever discretion we may have here we exercise in accordance with *Kaczmarczyk*, which found the reopening procedure to be an appropriate remedy for asylum petitioners seeking to rebut officially noticed facts.[10] Now that the present appeal has been resolved, we assume that the Board will fully address Zamora's motion in a timely fashion.[11]

B. *Luis Andres Esquivel-Berrios*

Like Zamora, petitioner Berrios argues that he was deprived of his right to due process because the Board

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[9] 28 U.S.C. § 2347(c). Other circuits have held without reference to improper action that remand may in certain circumstances be appropriate. *See, e.g., Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988); *Becerra-Jiminez v. INS*, 829 F.2d 996 (10th Cir. 1987); *Martinez de Mendoza v. INS*, 567 F.2d 1222 (3d Cir. 1977).

[10] 933 F.2d at 597. *See also Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1213-14 (9th Cir. 1983) (refusing to remand under § 2347 and noting that the petitioner could have filed a motion to reopen); *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 n. 9 (3d Cir. 1977) ("[I]n normal circumstances a party asserting new and material evidence should, in the first instance, resort to [the reopening procedure] rather than invoking our power under § 2347(c).").

[11] We noted above that the filing of a motion to reopen does not automatically stay execution of a Board ruling. *See supra* n. 6. As we observed in *Kaczmarczyk*, "[t]here thus exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." 933 F.2d at 597. We therefore reiterate here our presumption that "when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Id.; see also Gutierrez-Rogue*, 954 F.2d at 773 (adopting the same presumption).

failed to engage in sufficiently individualized consideration of his evidence. He also contends that the Board's finding that he does not have a well-founded fear of future persecution is not supported by substantial evidence for the same reason that Zamora alleges. Finally, Berrios argues that, even if the Board could reasonably conclude that he did not have a well-founded fear of future persecution, he was nonetheless entitled to asylum based on the severity of his *past* persecution.

1. *Due Process*

Again, we note the cloud cast over the Board's decision by its use of boilerplate paragraphs in describing the salient factors involved in its determination. In addition, the Board's written decision affirming the Immigration Judge's denial of Berrios' petition does not contain the sort of detailed description of Berrios' testimony that we saw in Zamora's case. Thus, it is less immediately apparent that the Board considered Berrios' evidence at all. Nevertheless, we find that the Board's decision contains sufficient indicia of individualized determination to satisfy due process. In particular, the Board notes Berrios' "testimony concerning the military round-up of young males, like himself, in Nicaragua." This statement indicates that the Board was aware of Berrios' specific claim. The Board also makes an explicit finding that the State Department's *Country Reports on Human Rights Practices* for the years 1984-1985 and 1987-1988, which Berrios claimed the Immigration Judge improperly prevented him from submitting, "do not establish his present eligibility for either withholding of deportation or asylum." Again, this finding suggests that the Board was at least

aware of the particulars of Berrios' case. Although, as in Zamora's case, the Board did not discuss the relationship between the change in the Nicaraguan government and Berrios' particular claims, the Board's consideration of Berrios' case was not so inadequate as to amount to a denial of due process.

2. *Substantial Evidence*

Like Zamora, Berrios also challenges the Board's finding that he did not have a well-founded fear of persecution based entirely on evidence as to the stability of the Chamorro regime that was not before the Board. As already noted, we will not consider such evidence for the first time on appeal. The Board's decision is supported by the evidence that was before it at the time it decided Berrios' case.[12] And Berrios' request that we remand to the Board with orders to consider his new evidence has even less basis than did Zamora's, since Berrios has never given the Board *any* opportunity to consider this evidence. Because the Board did not provide Berrios with an opportunity to rebut the noticed facts prior to deciding his case, Berrios has a due process right to have this

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[12] The Board noted in its decision that "the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." This evidence, together with the broad observation that the Sandinistas no longer controlled the Nicaraguan government, certainly tends to support a conclusion that Berrios no longer had a well-founded fear of persecution based on his avoidance of conscription into the Sandinista military should he be returned to Nicaragua.

evidence considered. *Kaczmarczyk*, 933 F.2d at 597. In order to do so, however, he must file a motion to reopen with the Board. *Id.*

We reject Berrios' argument that he is entitled to asylum based solely on the severity of his past persecution. In *Matter of Chen*, Interim Decision 3104 (BIA 1989), the Board held that where an asylum applicant has been subjected to especially severe persecution in the past, "humanitarian reasons" may warrant the granting of asylum "even if there is little likelihood of future persecution." Berrios contends that his is such an extraordinary case because he fled Nicaragua in order to avoid forcible conscription into the Sandinista military at the age of twelve, a practice that violates "settled principles of United States and international law." Br. at 23. But the Board, which clearly was aware of the nature of Berrios' claim, found that Berrios had not established the sort of extreme persecution necessary to meet the *Chen* standard. Given that Berrios was never in fact forcibly conscripted, or even personally threatened with forced conscription, we do not think that the Board's conclusion was unsupported.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

The Altamirano brothers, like both Zamora and Berrios, argue that the Board failed to accord them a sufficiently individualized determination of their claims. Their argument, however, has more merit than does that of Zamora or Berrios. The Board's written opinion dismissing the Altamiranos' appeal is made up *entirely* of

boilerplate; there is nothing in the opinion to suggest that the Board was even aware of the particular claims made by the Altamirano brothers. Every paragraph in the decision is identical to a paragraph in the Board's decisions regarding Zamora and Berrios. There is nothing individualized about the Board's analysis in this case. We agree with the Altamiranos that the Board's consideration of their case was so deficient as to deny them due process and therefore vacate the Board's decision and remand the case for additional proceedings consistent with this opinion. We assume that such proceedings will include an opportunity for the brothers to attempt to rebut the Board's conclusion as to the significance of the Nicaraguan elections.

The brothers also contend that the Board's conclusion that they did not have a well-founded fear of persecution given the change of government in Nicaragua is not supported by substantial evidence. They may well have a point – we are somewhat doubtful that a Board decision which demonstrates no awareness of the particular petitioner's claims could be supported by substantial evidence. Because we vacate the Board's decision on other grounds, however, we need not resolve this issue.

III. CONCLUSION

For the foregoing reasons, the petitions of Agustin Rhoa-Zamora and Luis Andres Esquivel-Berrios are denied; the petition of Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano is granted, and the Board's decision is vacated and remanded for

further proceedings consistent with this opinion. In addition, the petitioners' motions to adduce additional evidence pursuant to 28 U.S.C. § 2347(c) are denied. If the petitioners wish to present their new evidence to the Board, they should do so by way of a motion to reopen. Because such a motion implements a due process right, *Kaczmarczyk*, 933 F.2d at 597, it must be considered in good faith by the Board. *Supra* at 34 n. 8. We admonish the Board to consider petitioners' motions in that light.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A27 948 778 – Chicago Date: JAN 31 89

In re: AGUSTIN RHOA-ZAMORA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anthony W. Hong, Esquire
190 South LaSalle
Chicago, Illinois 60603

Mary R. Schlachtenhaufen, Esquire
One First National Plaza
Chicago, Illinois 60603

ON BEHALF OF SERVICE: Renetta Smith
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation

The respondent is appealing from the July 25, 1988, decision of the immigration judge that found him deportable as charged, and denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h). The respondent's asylum and withholding claims are based on a fear of harm from the

Sandinistas, who controlled the government at the time he departed Nicaragua. The appeal will be dismissed.

The respondent is a 56-year-old married male alien, a native and citizen of Nicaragua. The respondent does not contest his deportability on appeal, but argues that he should not be returned to Nicaragua. The respondent testified that he was persecuted in his native country for his Charismatic Catholic religious beliefs and as a leader in his church. The respondent described a mock mass held outside of his home by Sandinista supporters where they hung an effigy of his parish priest. The respondent testified that he was identified by the authorities while attending religious gatherings and was beaten by Sandinista mobs. Finally, the respondent testified that the Sandinistas would persecute him for allowing his children to leave Nicaragua.

After careful review of the record, we find no basis to support the respondent's contention that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 208(a) of the Act or that he has established a claim of past persecution sufficient to merit a grant of asylum relief. *See* section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.5; *Cuadras v. INS*, ___ F.2d ___, No. 88-7478 (9th Cir. August 3, 1990); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987); *Matter of Chen*, Interim Decision 3104 (BIA 1989).

In this regard, we take administrative notice that the Sandinista party no longer controls the Nicaraguan government.[1] Effective April 25, 1990, a new coalition government, formed by parties in opposition to the Sandinistas ("UNO"), has succeeded the former government of the Sandinista party following national elections and the inauguration of Violeta Chamorro as the new president. Further, the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription.[2] Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua.

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[1] It is well-established that administrative agencies and the courts may take judicial (or "administrative") notice of commonly known facts. *See Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937). *See, e.g., Third Nat. Bank In Nashville v. Impac Limited, Inc.*, 432 U.S. 312, 317 (1977); *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Schulte v. Gangi*, 328 U.S. 108, 120 (1946); *United States v. Berrojo*, 628 F.2d 368 (5th Cir. 1980); *First Nat. Bank of Chicago v. Material Serv. Corp.*, 544 F.2d 911, 916 (7th Cir. 1976); *Spillway Marina, Inc. v. United States*, 445 F.2d 876, 878 (10th Cir. 1971). *See generally* 4 Stein, Administrative Law, § 2501 (1986). This Board has previously taken administrative notice of changes in foreign governments. *See, e.g., Matter of Stojkovic*, 10 I&N Dec. 281 (BIA 1963). *See also Matter of Chen*, Interim Decision 3104 (BIA 1989).

[2] *See, e.g.*, Violeta Chamorro's inaugural address, as reported in *Chamorro Takes Nicaraguan Helm; Hails New Era*, New York Times, April 26, 1990, at A1.

Further, even if one were to assume that the respondent's previous experiences in Nicaragua amounted to past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently merits a grant of asylum. In *Matter of Chen, supra,* we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instance, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be inhumane. Even if past persecution had been established in the instant case, we would not conclude from our independent review of the record that there are humanitarian or compelling bases that presently warrant a grant of asylum.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he also has failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See INS v. Stevic,* 467 U.S. 407 (1984). The evidence does not establish that if he were now to return to Nicaragua that it is more likely than not that he would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act.

The respondent also argues that the immigration judge's adverse credibility findings were erroneous and not based on persuasive grounds, and that the immigration judge based his decision in part on facts not of record. We need not specifically address these allegations of error as no prejudice to the respondent has been shown even if the immigration judge erred in the manner

alleged, due to our findings, above. *See Matter of Santos*, Interim Decision 2969 (BIA 1984). As noted, the Sandinistas no longer govern Nicaragua and the respondent should have no fear in returning to his native country.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ James P. Morris
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Chicago, Illinois

File No.: A27 948 778 July 25, 1988

In the Matter of JOSE AGUSTIN RHOA-ZAMORA Respondent.	)	IN DEPORTATION PROCEEDINGS

CHARGE: I&N Act Section 241 (a)(2) (8 U.S.C. Section 1251 (a)(2)) . . . entry without inspection.

APPLICATIONS: Sections 208 and 243 (h) of the Act. (8 U.S.C. Sections 1185 and 1253 (h)) . . . asylum and/or withholding of deportation and in the alternative, under Section 244 (e) (8 U.S.C. Section 1264 (e)) . . . voluntary departure.

ON BEHALF OF RESPONDENT:

Mary Ann O'Connor, Esq.
1 First National Plaza,
Ste 0286
Chicago, Illinois 60670

ON BEHALF OF SERVICE:

Christine Young, Esq.
General Attorney
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Rm. 486
Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a fifty-four year old married male, native and citizen of Nicaragua. On December 24th, 1986, the respondent entered the United States near Brownsville, Texas. On December 25th, 1986, the Immigration and Naturalization Service [hereinafter the Service]

issued an Order to Show Cause to the respondent pursuant to 8 C.F.R. Section 242.1 (a) (Exhibit 1). In this document, the Service contends that the respondent is deportable under Section 241 (a)(2) of the Immigration and Nationality Act [hereinafter, the Act] for having entered the country without inspection. In conjunction with a request for change of venue submitted to the Immigration Judge in Harlingen, Texas, the respondent conceded deportability under Section 241 (a)(2) of the Act. The change of venue to Chicago was granted on August 3rd, 1986 [Exhibit 3]. At the proceedings held in Chicago on August 27th, 1987, April 13, 1988, May 9, 1988 and July 25th, 1988, the respondent, through counsel admitted the factual allegations contained in the Order to Show Cause and conceded deportability on the charge set forth therein. Based on the respondent's admissions, I find that he is deportable as charged and that the evidence is clear, convincing and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. Section 242.14 (a) (1987).

In lieu of an Order of Deportation, respondent has filed an I-589 application for political asylum pursuant to Section 208 of the Act [Group Exhibit 2]. And a previous application on form I-589 [Group Exhibit 5] which was filed on January 13th, 1987 in the District Office of the Immigration and Naturalization Service at Miami, Florida. We note that that was signed by the respondent on January 12th, 1987. This is the initial application that was forwarded to the State Department and as a result a response from the State Department was received. See Exhibit 4. And this is the application that was initially renewed before the Court and the Court granted an opportunity to submit an updated application which is

Group Exhibit 2. A request for asylum made after the initiation of deportation proceedings is also considered a request for withholding of deportation under Section 243 (h) of the Act. See *Matter of Rodriguez-Palma*, 17 I&N Dec. 465 (BIA 1980); 8 C.F.R. Section 208.3 (b) (1987). In the alternative, the respondent has requested voluntary departure pursuant to Section 244 (e) of the Act.

Pursuant to 8 C.F.R. Section 208.10 (b), the respondent's asylum application was referred to the Department of State, Bureau of Human Rights and Humanitarian Affairs, for an advisory opinion. See *Matter of Saban*, 18 I&N Dec. 70 (BIA 1981). In a one page letter dated September 17, 1987, the Bureau advised that, in their opinion, the respondent failed to establish a well-founded fear of persecution in Nicaragua within the meaning of the Act. [Exhibit 4]. However, this opinion was based on the application as originally submitted my [sic] the respondent, See Group Exhibit 5. The second application was not forwarded to the State Department in view of the fact that the Court is required to have but one response from the State Department.

While the reliability of the State Department's advisory opinions in individual cases has been questioned, s.e. [sic] *Khalil v. District Director*, 457 Fed. 2nd. 1276, 1277, n.3 (9th Circuit 1972), there [sic] value as a source of information about the general conditions in foreign countries has recognized, e.g. *Jaen v. INS*, 564 Fed. 2nd. 155, 156 (3rd Circuit 1977). However, the State Department's response is not dispositive of the asylum request, as it is the Immigration Judge's responsibility to determine whether an applicant in deportation proceedings qualifies for asylum on the merits. 8 C.F.R. Section 201.8 (b)

(1987); c.f. *Matter of Francosis*, 50 I&N Dec. 534 (BIA 1975). Moreover, the advisory opinion is not germane on the issue of withholding of deportation. *Carvajal Munoz v. INS*, 743 Fed. 2nd 562, 570, 7th Circuit (1984).

Standard for asylum and withholding of deportation.

The alien bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under Section 243 (h) or asylum under Section 108 of the Act. *Matter of Costa*, Int. Dec. 2986 (BIA 1985); 8 C.F.R. Sections 208.5, 2.2.17 (c) (1987).

An alien who is seeking withholding of deportation from any country must establish by a "clear probability" that his or her life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion. See *INS v. Stevic*, 467 U.S. 407, 413 (1984); Section 243 (h) of the Act. The "clear probability" standard requires a showing that it is "more likely than not" that an alien would be subject to prosecution. *Stevic, Supra*, F 429-30.

To qualify for asylum under Section 208 of the Act, an alien must demonstrate that he or she is a "refugee" within the meaning of Section 101 (a)(42)(A) of the Act. Section 101 (a)(42)(A) defines a refugee as one who is unwilling or unable to return to his or her homeland due to a "well-founded fear" of persecution on account of any of the same grounds as are enumerated in the withholding statute. Unlike withholding of deportation, an applicant for asylum under Section 108 of the Act may be denied this relief in the discretion of the Immigration

Judge, as the Attorney General's delegate, notwithstanding the alien's statutory eligibility. *See* Section 208 of the Act.

In *INS v. Cardoza-Fonseca,* 107 S.C.1207 (1987), the United States Supreme Court determined that "well-founded fear" standard of asylum is not to be equated with the more difficult to meet "clear probability" standard of withholding. *Cardoza-Fonseca, Supra,* F1219. The Court did not define "well-founded fear" but did hint that the two standards have "significantly different" meanings. *Cardoza-Fonseca, Supra,* F1222 n 31. In response to *Cardoza-Fonseca,* the Board of Immigration Appeals in *Matter of Mogharrabi,* Int. Dec. 328 (BIA June 12, 1987), has adopted the following general approach: "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." *Mogharrabi, Supra* F9. The Board added "a reasonable person may well fear persecution even where it's [sic] likelihood is significantly less than clearly probable." *Mogharrabi, Supra* F10. In practical terms, the alien is required to establish that: (1) The alien possesses a belief or characteristic the persecutor seeks to overcome in others by means of punishment of some sort; (2) The persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) The persecutor has the capability of punishing the alien; and (4) The persecutor has the inclination to punish the alien. *Mogharrabi, Supra* F11 [citing *Matter of Acosta,* Int. Dec. 2986 and 22 (BIA 1985)].

Withholding of deportation

The respondent claims that he would be subject to persecution in Nicaragua on account of his religious convictions. The respondent has testified that on several occasions that he was identified in demonstrations, one most significantly was when the Pope was in Nicaragua celebrating the mass. He indicated that there were incidents as well, subsequent, and more importantly, prior to his departure and while his wife was still in Nicaragua, of a mass, a mock mass, being conducted outside his home and that a effigy of the priest of his local parish was hung from a tree. Respondent has testified that his family members, his children had departed the country prior to his ultimate departure, that he feared further persecution due to the act of having his children leave. The trial attorney has pointed out that the respondent's wife had indicated that he wished to remain in the country because it was tranquil and that she also testified further that one of the sons actually completed military service in Nicaragua prior to his departure from that country. The record further reflects that the respondent has siblings and other members of his family residing in Nicaragua and that they have too, on occasion, completed their military obligations. Respondent has testified here, in length, as to his beliefs and his religious fervor. The Court did note earlier in the proceedings, and cautioned the respondent that his answers and replies to significantly less important questions would and may influence the Court in deciding whether or not the respondent was truthful to the Court. The Court noted that on previous occasions, the respondent was evasive and did not answer the questions directly but circuitously and on

occasions outright refused to answer the question. The Court noted the demeanor of the respondent and more particularly the lack of eye contact with the Court when answering the questions presented to him by the Court. The Court notes that the respondent was evasive in his testimony here before the Court. The significant factor that the Court must not overlook is item addendum of his previous application. Question 1. What is the nationality of your spouse? Nicaraguan. Question 2. What was your former occupation-employment in your home country and reason for leaving? "I was a businessman on my own and I left the country because as I refused to cooperate with the Sandinistas, I was accused of being a sympathizer of the counter-revolution. As the pressures were increasing due to my political posture, I had to leave the country and sent my children before me out of the country." Question no. 3. Why did you leave your home country or country of nationality? "I left because the government had clamped down on all the businesses that are not integrated to them. There is no longer freedom to make business. I left alone to speak out politically. I left before the Sandinistas might had the opportunity to take reprisals against me." We have noted that the Board and as well, the Immigration Judge, has been criticized by the appellate levels for failure to make a credibility finding. See *Conjura-Flores v. INS*, 78 Fed. 2nd 885 (9th Circuit 1985). The Court notes that the respondent's testimony here, as characterized by the government, has not been candid or credible. The Court notes that the respondent if in fact his fears were as precise as he indicated and if in fact this occurrence took place in his residence, outside his residence, in the hanging of a parish priest in effigy,

that this fact would not have been omitted from the original application. And yet, it's presented here in this court subsequently, which casts some question upon the credibility of the respondent's initial story, the one that was presented to the State Department, the one that was important enough for them to prepare a statement or an application to be forwarded to the State Department. One does not expect that material matters of this import would be omitted, unless of course, they were a figment of one's imagination, or, unfortunately on occasion, when advocates prepare an respondents for their case, and the Court does not criticize any advocate for doing so, sets forth the prima facie elements required for one to establish his case. This is not uncommon and to think otherwise would be absurd. By this the Court does not infer that any conduct by the respondent's attorney is improper, or that in fact, subordination of perjury had occurred. Far be it.

The Court notes however, the line between advocacy and subjectiveness sometimes is crossed. The Court does not find it in this case that it has been crossed by this respondent's attorney. However, the respondent himself apparently has brought forward factors that were not presented to the State Department. They are factors that are not insignificant, that they are material and the only admission the Court must assume therefore by that is that it did not in fact occur and that these are occurrences that are now presented to the Court in order to influence the Court to grant the respondent's applications. Regretfully, the court finds that the story is not credible as presented to the Court for these reasons. For the testimony of the

respondent's wife in particular, finding that the respondent had a tranquil existence in Nicaragua. The question is, and the Court notes, that the respondent, when the Somoza regime was in power, left the country with his family to go to Costa Rica and apparently returned back to Nicaragua after the Sandinistas came into power. The Court notes, contrary to what the respondent has indicated, that visas are not required in Central America, that merely to present . . . that presenting one's cedula may permit ingress and egress in the Central American countries. And the Court notes that there was no reason why the respondent himself could not, if in fact he had a plausible story of persecution, why he could not have gone to one of the other Central American countries that are not engaged in this conflict. The Court notes that some of these countries are signatories to the United Nations Protocol and Convention.

One must look at the actions of the respondent and not at the words that he expresses before the Court. Acts speak louder than words, and we find here a consorted effort to remove his family from Nicaragua, but not for political reasons and not for religious reasons, but for economic reasons. And as the trial attorney has indicated, economic reasons alone are not the basis that Congress intended that we grant this relief. In *Fonseca-Cardoza, Supra,* it is axiomatic that the Supreme Court has indicated that the story had to be, in fact, believed and the Court does not, frankly, believe the testimony of the respondent. And that is (indiscernible) and therefore, for the same reasons does not rely upon the testimony of the respondent's wife that the respondent's attorney heavily believes corroborates the testimony of the respondent.

The Court notes that other members of the family are present in the United States that were not presented to the Court and one must think whether or not they were not presented for the purpose that they were not to be cross examined by the government or examined by the Court and their omissions may be more significant than not in this context.

The Court notes that documentary evidence does not specifically relate to the respondent and the Court notes that there were documents submitted to the Court prior to the proceedings and that the Court will include them into the record as Group Exhibit 9, the next exhibit. Accordingly, having reviewed the documentary evidence, the testimony evidence, the case laws cited, the Court finds that the respondent's request for withholding of deportation will not be granted.

Discussion as to asylum

Having established that the respondent has not, through credible statements, established clear probability that he would be subject to persecution upon return to Nicaragua, I also find for the same reasons that he has not established a subjective fear of persecution and that this fear, in this case, is not well-founded. *Matter of Lam*, 18 I&N Dec. 15 (BIA 1981).

Unlike withholding of deportation, which is mandatory, relief under Section 208 may be denied in the discretion of the Immigration Judge. *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982). In the exercise of discretion requires a balancing of favorable and unfavorable factors of

record. *Shahandeh-Pey v. INS*, Slip op. no 8-2890 (7th Circuit October 28, 1987) citing *Matter of Marin*, 69 I&N Dec. 589 (BIA 1978). Factors which the Board of Immigration appeals has deemed favorable to applicants for asylum include: (1) Family ties within the United States; (2) Residence of long duration in the United States; (3) Evidence of hardship to the alien and family if deportation occurs; (4) Service in this country's armed forces; (5) History of employment; (6) Existence of property or business ties or evidence of valuable service to the community; (7) Proof of genuine rehabilitation if a criminal record exists and (8) evidence attesting to an alien's good character. *Marin, Supra*, F586. Among the factors deemed adverse are the nature and entry of the deportation grounds at issue, the existence of a criminal record, evidence of bad character, or any of the grounds listed at 8 C.F.R. Section 208.8(f) (1987).

In *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), the Board held that an alien who circumvents the orderly process for obtaining refugee status in the United States will be denied asylum as a matter of discretion unless there are strong contrevalling [sic] equities to overcome this serious adverse factor. *Salim, Supra*, F311; See *Matter of Gharadachi*, Int. Dec. 3001 (BIA November 1, 1985). However, in the recent case of *Matter of Pula*, Int. Dec. 3033 (BIA September 22, 1987), the Board withdrew from the emphasis they had placed on the circumvention of orderly refugee procedures in *Salim*. The Board concluded that "[this [sic] factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case." *Pula, Supra*, F9.

The respondent in this case circumvented the orderly procedures for obtaining refugee status when, instead of applying for refugee status in Mexico, entered the United States on foot with the aid or assistance. The respondent has testified that the means for his coming to the United States were arranged by his family in the United States and that his family had come to the United States prior to himself and that they also entered the United States illegally in a concerted effort so that we have here a family who has circumvented the Immigration processes to afford themselves an opportunity to live in the United States rather than going through the normal procedures as required by others. By entering this country unlawfully, the respondent was eventually able to apply for asylum ahead of other individuals who are following the orderly process for obtaining refugee status.

As a second negative factor of record, I find that the respondent has been less than candid and completely truthful with this Court. As stated above, the Court believes that the testimony of the respondent here has been artificed in order to afford the respondent an opportunity to remain in the United States. The fact that he did not initially present it initially to the Court when he had the opportunity augers to the veracity of the respondent. The Court notes also that we're in a nebulous area. That if in fact Charismatics are being persecuted in Nicaragua, that their numbers are extremely high. And the respondent has wished to characterize himself as someone important enough for the Nicaraguan government to point him out and give him special treatment. Again, his background, his education and so forth is not a significant factor for the government to single him out for

treatment of the sort that he wishes the Court to conclude. The Court notes that the respondent had a business and a house and the question of whether or not that's still within his ownership is still questionable to the Court here today. Except for his self-serving statements that he sold it before coming to the United States. Basically, the respondent's whole testimony contradicts what his lifestyle previously has set forth in the record in that he was a businessman. There's contradictions here also, the fact that he was working at a country club that was destroyed or damaged during the earthquakes in Nicaragua and apparently he has a long business in Nicaragua and that the economic deprivation that he faced there does not distinguish him from others. The Court notes that the conditions, economic conditions in Nicaragua are severe. But this is not the basis in which the Court was to grant asylum. In view of the fact that the Court believes the respondent has misstated the facts in order to obtain the benefit here, the Court finds his testimony is not truthful or believed.

Third, corroboration is the utmost importance in deciding withholding asylum and withholding of deportation claims. Objective evidence of persecution should be offered whenever possible. *Carvajal-Munoz, Supra,* F579. In this case, the wife had testified but the children have not come forward to testify and their failure to come before the Court is significant. They would in fact tell the Court whether, in closer examination, whether or not in fact the parents are what they claim to be and whether or not they have this fervor. One also questions when a man has a child out of wedlock whether or not he has the requisite religious fervor that this respondent wishes this

Court to believe. There are inconsistencies and contradictions in this regard as well in the earlier testimony that the respondent had testified before the Court. That does not ring true to the story that the respondent wishes the Court to believe.

After careful consideration of the record, I conclude that the respondent has not established sufficient equities to outweigh the negative factors of the record. Accordingly, his request for asylum will be denied for the reasons as stated above. *Shahandeh-Pey, Supra.*

Discussion as to Voluntary Departure.

The respondent has applied for, in the alternative, for voluntary departure and the Court notes that it has found that the respondent has, in effect, lied to the Court as such and that the Court should not award people who lie to the Court. But nevertheless, the Court understands the posture and does not condone the conduct of the respondent but can understand it. The Court notes that in Central America, the respondent was able to live in other countries such as Costa Rica and that the respondent has a choice now. To leave voluntarily, which the Court will grant him that relief to afford him an opportunity to go wherever he wish. But if the respondent refuses to depart voluntarily and make arrangements for his departure to go to a friendly country, then the respondent will be deported to his home country of Nicaragua. Again, the choice is his since the Court will grant voluntary departure. It does so reluctantly however for it does not wish to reward on the one hand, but the Court wishes to be compassionate on the other.

Considering the record in its entirety and seeing the documentary evidence and the testimony evidence, the favorable factors as well as the adverse factors, the case law cited, the Court finds it is meet [sic] and proper to enter the following orders.

ORDER

IT IS HEREBY ORDERED THAT the application for withholding of deportation under Section 243 (h) of the Act be in the same is hereby denied.

IT IS FURTHER ORDERED THAT the respondent's application for asylum under Section 208 of the Act be in the same is hereby denied.

IT IS HEREBY ORDERED THAT the respondent is granted voluntary departure without expense to the government on or before September 25th, 1988 or any extension beyond such time as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED THAT if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective.

EFFECTIVE. Respondent shall be deported from the United States to Nicaragua on the charge contained in the Order to Show Cause.

O. JOHN BRAHOS
Immigration Judge

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review
Office of the Immigration Judge

File: A27948778	) IN DEPORTATION/
In the Matter of:	) ~~EXCLUSION~~/~~RESCISSION~~
Augustin Rhoa-Zamora	) PROCEEDINGS
Respondent/~~Applicant~~	) PURSUANT TO 8 U.S.C.
	) 1101 et. seq. (The
	) Immigration & Nationality
	) Act)

MEMORANDUM OF ORAL DECISION

This is a summary of the oral decision entered on 7-25-88 in Chicago, Illinois.

This memorandum is solely for the convenience of the parties. If the decision is appealed, or the proceedings should be reopened, the oral decision will be transcribed and will become the official decision in these proceedings.

_ The Respondent was ordered deported to _____.

_ The Applicant has been ordered excluded and deported.

_ The Respondent was granted voluntary departure on or before 9-25-88 with an alternate order of deportation to Nicaragua.

_ The Respondent was granted/denied relief under Section _____.

_ The application for Suspension of Deportation under Section 244(a) of the Act was granted/denied/withdrawn.

_ The application for adjustment of status under Section 245 of the Act was granted/denied/withdrawn. It was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

X The application for Asylum/withholding of Deportation under Section 208(a)/243(h) of the Act was ~~granted~~/denied/~~withdrawn~~.

_ The proceedings were terminated.

_ The Applicant is admitted as a ____ nonimmigrant until _____.

_ On condition that a maintenance of status and departure bond in the amount of _____ be posted.

_ The Applicant's request for leave to withdraw the application for admission to the United States was granted.

_ The Applicant/Respondent was granted a waiver under Section ____ of the Act and the proceedings were terminated.

_ The Respondent's status was rescinded under Section 246 of the Act.

_ The hearing was held *in absentia*.

_ _____
_____
_____
_____
_____
_____
_____

X This decision is final unless an appeal is taken to the Board of Immigration Appeals by returning to this office on or before 8-4-88 three copies of Form I-290A, Notice of Appeal, properly executed, together with a fee of one hundred ten dollars ($110.00). The INS/

Respondent/~~Applicant has~~/have ~~waived~~/reserved appeal.

ID #0090V

/s/ Illegible
IMMIGRATION JUDGE

File: A27 948 778 – Chicago Date: Sep 23 1992

In re: AGUSTIN RHOA-ZAMORA

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENT: Elpidio R. Villarreal, Esquire
Jill A. Thompson, Esquire
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]
– Entered without inspection

APPLICATION: Reconsideration

In a motion filed on April 25, 1991, the respondent has requested the Board to reconsider its January 31, 1991, decision denying the respondent's appeal from the July 25, 1988, decision of an immigration judge. Based on the following, the motion to reconsider will be denied.

In his decision, the immigration judge found that the respondent had failed to establish either a well-founded fear of persecution or a clear probability of persecution in returning to Nicaragua. In our decision, the Board took administrative notice of the change in government in Nicaragua, and further found that even if the respondent's experiences with Sandinista-led mobs could be considered persecutory in nature, the respondent did not merit a grant of asylum in the United States in the exercise of administrative discretion. Finally, the Board found no clear probability of persecution to the respondent

upon his return to his native country, thus failing to establish eligibility for withholding of deportation from the United States.

In essence, in his motion the respondent avers that the Board erred in taking administrative notice of the changed conditions in Nicaragua. In this regard, the respondent has submitted voluminous documentary evidence to support his contention that the Sandinista party exerts *de facto* control over the country, little more than including its control of the military and law enforcement forces within Nicaragua. The respondent has also presented an affidavit from an expert on Nicaragua, past and present. This expert also confirms that the Chamorro government is under the control of the Sandinistas. He opines that the respondent's fears of returning to Nicaragua are real and justified.

After reviewing all of the evidence presented by the respondent in support of his motion, we will deny the respondent's motion. The respondent has not presented any persuasive evidence to indicate that the Board's prior decision in this case was erroneous, or that the issues addressed therein should be reexamined in light of the evidence presented in his motion. *See Matter of Cerna*, Interim Decision 3161 (BIA 1991). At the time the Board rendered its decision, general elections in Nicaragua had taken place less than one year before, with the Sandinista party voted out of power by the people of that country. While subsequent evidence has shown that the Chamorro government has not been able to curb all of the civil unrest, including both urban and rural instances of indiscriminate killing, it has been able to restore, to a large extent, respect for human rights. In fact, the Department

of State's *Country Reports on Human Rights Practices* for 1990, submitted into evidence by the respondent, confirms that Nicaragua's record of human rights has dramatically improved since the 1990 elections in spite of the fact that the Chamorro government entered into an agreement that effectively placed the military and police forces under the control of former high ranking Sandinista officials.

Moreover, the affidavit by the respondent's expert witness suggests that the Board did not recognize the *de facto* control of the Chamorro government by the Sandinistas and that violence is still present in the rural areas where the respondent will reside. We do not find it appropriate, however, to determine in this particular case whether or not, or to what degree, the Sandinistas exert control over the present government in Nicaragua. This issue is largely irrelevant to the present case since the overall conditions in Nicaragua are not the issue here. We would point out that the respondent primarily feared returning to Nicaragua because of his experiences as a Charismatic Catholic who was harassed, and who was beaten on one occasion, by Sandinista-led mobs. Our review of the present evidence introduced by the respondent does not show any indication that such mobs are still present in Nicaragua. In fact, the respondent's evidence indicates that between 80-90% of the population of Nicaragua is catholic, as apparently has been the case for decades, including the years during the Sandinista-led government. And while this Board has had numerous occasions to review cases from Nicaraguan nationals alleging religious persecution, the overwhelming majority of these cases involved harassment activities by

Sandinista-led organizations, which saw the Catholic Church, a highly organized organization in its own right, as perhaps the major obstacle to consolidation over Nicaraguan society.

Simply stated, whatever the present situation in Nicaragua, the respondent has presented no evidence that he stands any reasonable likelihood of being singled out for persecution on account of his religious beliefs. In fact, the respondent's expert witness does not state that Sandinista mobs are currently operating in that country, a country the evidence suggests is undergoing a deepening economic crisis. Nor does this witness state that Charismatic Catholics, or any other religion in Nicaragua, is experiencing any particularized hardships. Moreover, to the extent that the respondent fears returning to his native country based on the overall conditions there, particularly in the rural areas, such generalized fears will not afford an alien any of the protections set forth in the Immigration and Nationality Act. *See generally Matter of Exame*, 18 I&N Dec. 303, 305 (BIA 1982). For these reasons we find that the respondent has failed to sustain his burden for the Board to grant his motion by reconsidering its prior decision in this case. 8 C.F.R. §§ 3.2, 3.8 (1992).

Accordingly, the respondent's motion to reconsider will be denied.

ORDER: The motion to reconsider is denied.

/s/ James P. Morris
FOR THE BOARD

944 F.2d 905 (Table)
Unpublished Disposition
(Cite as: 944 F.2d 905)

NOTICE: Sixth Circuit Local Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

Daniel Felix ULLOA, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 91-3028.

United States Court of Appeals, Sixth Circuit.

Sept. 17, 1991.

On Petition for Review of an Order of the Board of Immigration Appeals, No. A28 704 546.

BIA

REMANDED AND ORDER STAYED.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

(THE FOLLOWING UNREPORTED DECISION IS REPRODUCED FOR THE CONVENIENCE OF RESEARCHERS. ADD THE NOTATION: (text in WESTLAW) TO ANY CITATION OF THIS DECISION.)

Before DAVID A. NELSON and SUHRHEINRICH, Circuit Judges, and HARVEY*, Senior District Judge.

PER CURIAM.

Petitioner Daniel Ulloa, a citizen of Nicaragua, petitions for review of a decision of the Board of Immigration Appeals ("Board") denying his request for asylum and withholding of deportation. For the reasons stated below, we remand for additional proceedings consistent with this opinion.

I.

Ulloa entered the United States on March 10, 1985, at Miami, Florida, as a non-immigrant visitor. He remained in the United States after the expiration date of his visitor's visa. The Immigration and Naturalization Service ("INS") ordered petitioner to show cause why he should not be deported pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. s 1251(a)(2). Petitioner conceded deportability and applied for asylum or withholding of deportation based upon his past experiences with and fear of future persecution from the Sandinista government of Nicaragua.

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* The Honorable James Harvey, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

On December 11, 1989 the Immigration Judge ("IJ") found petitioner to be deportable as charged, but granted his application for asylum and withholding of deportation. The INS appealed to the Board. On December 11, 1990 the Board affirmed the IJ's determination of deportability, but reversed the grant of asylum and withholding of deportation. The Board first noted that the IJ had not found that petitioner was the subject of "past persecution" in Nicaragua. The Board also independently concluded that petitioner had failed to show he was the victim of "past persecution." The Board then took administrative notice of the fact that the Sandinista government no longer controlled Nicaragua because of the April 25, 1990 election of Violeta Chamorro's new coalition government. The Board determined that petitioner could not suffer persecution under the new Chamorro government because the new government granted a general amnesty to the Contras and ended military conscription. The Board therefore concluded that this change in government eliminated petitioner's "fear of future persecution" in Nicaragua, and reversed the IJ's decision. The Board granted petitioner 30 days to voluntarily depart the United States. This appeal followed.

II.

Petitioner contends that the Board improperly took administrative notice of the change in Nicaragua's government without affording him notice and an opportunity to introduce evidence that the Sandinistas still control much of the government, including the military.

We agree with the recent decision in Kaczmarczyk v. INS, 933 F.2d 588, 593-95 (7th Cir.1991) that the Board may properly take administrative notice of, and base its decision on, a change in the political climate of an alien's native country. However, unlike Kaczmarczyk, where the Board's administratively noticed facts simply supplemented the IJ's factual findings and conclusions, the Board here reversed the IJ's decision based on the administratively noticed facts. This reversal of the IJ's grant of asylum and withholding of deportation occurred without either prior notice or affording petitioner an opportunity to present rebuttal evidence.

It is well established that aliens are entitled to notice and an opportunity to be heard in deportation proceedings. See Landon v. Plasencia, 459 U.S. 21, 32-33 (1982); Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). When an administrative agency takes official notice of facts that "could be reasonably challenged and they importantly affect the decision, giving the parties a pre-decision chance to respond to them may be an essential part of fair procedure." Banks v. Schweiker, 654 F.2d 637, 642 n. 11 (9th Cir.1981) (quoting 3 K. Davis, Administrative Law Treatise, s 15:6 at 195-96 (2d ed. 1980)). "Such fairness concerns appear to have motivated the drafters of Federal Rule of Evidence 201(e), which provides litigants in federal court just such an opportunity to rebut judicially noticed facts." Kaczmarczyk, 933 F.2d at 596. We believe similar notions of fairness require that the Board give aliens adequate notice and a meaningful opportunity to respond to officially noticed facts that bear upon the Board's decision-making process. While our scope of review over deportation proceedings is narrow, "it

extends at least to a determination as to whether the procedure followed by the Board in a particular case constitutes an improper exercise of discretion." Ravancho v. INS, 658 F.2d 169, 176 (3d Cir.1981) (remanding case to the Board due to Board's failure to consider all relevant evidence offered by petitioner).

We conclude that the procedure followed by the Board in the present case was an improper exercise of discretion because it denied the petitioner any meaningful opportunity to present rebuttal evidence.[1] Consequently, we REMAND this case so that petitioner may offer rebuttal evidence regarding the change of governments in Nicaragua and STAY the order of deportation until such evidence has been considered by the Board.

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[1] The INS contends that petitioner may present rebuttal evidence in a motion to reopen his case pursuant to 8 C.F.R. s 3.2. In our view, requiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an unnecessary procedural hurdle for such a petitioner. The filing of a motion to reopen does not serve to stay the execution of an order of deportation, see 8 C.F.R. s 3.8(a), and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence contained in his motion to reopen. Cf. Kaczmarczyk, 933 F.2d at 597 n. 9.

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944 F.2d 905 (Table), Unpublished Disposition
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No. 92-1299

In the Supreme Court of the United States

OCTOBER TERM, 1992

AGUSTIN RHOA-ZAMORA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the filing of a motion to reopen before the Board of Immigration Appeals renders the challenged decision nonfinal and thus deprives the courts of appeals of jurisdiction to entertain a petition for review of that decision.

2. Whether the Board of Immigration Appeals deprives a litigant of due process if it takes official notice of facts relevant to a matter before it without first giving the litigant prior notice, even if it grants the litigant an opportunity to rebut the noticed facts by means of a motion to reopen.

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No. 92-1299

AGUSTIN RHOA-ZAMORA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 971 F.2d 26. The decisions of the Board of Immigration Appeals (Pet. App. A25-A29) and the immigration judge (Pet. App. A30-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. The court of appeals denied a petition for rehearing on November 4, 1992. The petition for a writ of certiorari was filed on February 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Nicaraguan citizen who entered the United States without inspection near Brownsville, Texas, on December 24, 1986. The Immigration and Naturalization Service (INS) apprehended him on December 25, 1986, and initiated deportation proceedings. Pet. App. A3, A26, A30-A31.

2. At his deportation hearing, petitioner conceded that he was deportable and applied for asylum and withholding of deportation. Pet. App. A31-A32. In support of that application, petitioner testified that he had been active in the Charismatic Catholic movement in Nicaragua and had associated publicly with a priest the Sandinistas had treated as a counterrevolutionary. He also testified that on one occasion a mob of people celebrated a mock mass outside his home, during which they hung and burnt an effigy of the priest and threatened similar treatment for sympathizers of the Contra movement (which was opposed to the Sandinistas). *Id.* at A35-A36; AR 589-595.[1] Petitioner argued that he had left Nicaragua because he feared persecution as a result of those events.

The immigration judge denied petitioner's applications for asylum and withholding of deportation. Pet. App. A30-A44. The judge discounted petitioner's testimony as neither "candid" nor "credible." *Id.* at A36. Among other things, the judge noted "particularly the lack of eye contact with the [judge] when answering the questions presented to him by the [judge]." *Ibid.* The judge also emphasized petitioner's failure to include the story about the burning in effigy in his original application for asylum, concluding that "if in fact [petitioner's] fears were as precise as he indicated and if in fact this occur-

[1] "AR" refers to the certified administrative record of petitioner's deportation proceedings.

rence took place * * * this fact would not have been omitted from the original application." *Id.* at A36-A37. The judge thus concluded that the incident "did not in fact occur." *Id.* at A37. Reviewing the record in light of that determination, the judge concluded that petitioner and his family left Nicaragua "not for political reasons and not for religious reasons, but for economic reasons." *Id.* at A38. Because petitioner had failed to establish a fear of persecution, the judge denied his applications for withholding of deportation, *id.* at A39, and asylum, *id.* at A39-A43.

3. Petitioner appealed to the Board of Immigration Appeals, which dismissed the appeal after briefing. Pet. App. A25-A29. First, the Board took administrative notice "that the Sandinista party no longer controls the Nicaraguan government," explaining that effective April 25, 1990, a coalition of parties opposed to the Sandinistas had taken office following national elections in which Violeta Chamorro was elected president. *Id.* at A27. The Board also noted that President Chamorro had "announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." *Ibid.* Because petitioner's claim of persecution was based on his fears of the Sandinistas and their supporters, *id.* at A26, the Board found that the record could not support a finding that petitioner had a well-founded fear of persecution, *id.* at A27.

On April 25, 1991, petitioner filed a motion to reopen with the Board. On the next day, he filed a petition for review in the court of appeals. Pet. App. A5.

4. The court of appeals denied petitioner's petition for review. Pet. App. A1-A24.

a. First, the court considered whether it had jurisdiction over the petition for review filed by petitioner. Pet. App. A10-A15. The court questioned whether the motion

to reopen rendered the decision of the Board nonfinal and therefore not susceptible to challenge on a petition for review. See 8 U.S.C. 1105a(a) (1988 & Supp. III 1991) (petitions for review in the courts of appeals limited to "final" orders of deportation). The court noted that the courts of appeals for the Ninth and Eleventh Circuits have concluded that filing a motion to reopen deprives an order of deportation of finality, and thus precludes review by the court of appeals. Pet. App. A10-A11 (citing *Fleary* v. *INS*, 950 F.2d 711 (11th Cir. 1992); *Chu* v. *INS*, 875 F.2d 777 (9th Cir. 1989); *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984)). The court of appeals, however, rejected the reasoning of those courts, choosing instead to follow the Third Circuit's conclusion that jurisdiction is proper in these circumstances. Pet. App. A11-A15 (citing *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989)).

b. On the merits, the court rejected all of petitioner's claims. Pet. App. A15-A19. Of relevance to this petition, it concluded that the Board did not deprive petitioner of due process by taking official notice of the change in Nicaraguan government without giving petitioner prior notice. *Id.* at A16. The court adhered to the conclusion it reached in *Kaczmarczyk* v. *INS*, 933 F.2d 588 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991), that the Board affords a litigant due process when it takes official notice if it "allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts" by means of a motion to reopen. Pet. App. A16 (quoting *Kaczmarczyk*, 933 F.2d at 597).[2]

[2] The court of appeals consolidated petitioner's petition for review with petitions filed by Felipe Antonio Juresma-Altamirano, Luis Rodriguez-Altamirano, and Luis Andres Esquivel-Berrios. Esquivel-Berrios has filed a separate petition for a writ of certiorari, *Esquivel-Berrios* v. *INS*, No. 92-1271, to which we are filing a separate response.

5. The Board subsequently denied petitioner's motion to reopen. Pet. App. A48-A51. The Board concluded that the additional evidence introduced by petitioner was inadequate to establish that the Board erred in taking official notice of the change in the Nicaraguan government. The Board acknowledged that "the Chamorro government has not been able to curb all of the civil unrest," but stated that the evidence indicates that the government "has been able to restore, to a large extent, respect for human rights." *Id.* at A49. Moreover, the Board concluded, "the overall conditions in Nicaragua are not the issue here." *Id.* at A50. The Board explained that petitioner's alleged fear of persecution rested on the suggestion that Sandinista-led mobs were harassing Charismatic Catholics. The Board stated that petitioner's evidence "does not show any indication that such mobs are still present in Nicaragua," or that "Charismatic Catholics, or any other religion in Nicaragua, is experiencing any particularized hardships." *Id.* at A50-A51. Accordingly, the Board declined to reconsider its earlier decision. *Id.* at A51.

ARGUMENT

1. Whatever the merits of the question presented by petitioner, the case does not offer an appropriate occasion for considering that question, because the petition presents a threshold jurisdictional issue not appropriate for resolution in this case. Although the government agrees with the court of appeals' conclusion that it had jurisdiction over the petition for review, that court correctly noted that the Ninth and Eleventh Circuits have taken a contrary view. Those courts have concluded that the filing of a motion to reopen with the Board of Immigration Appeals renders the challenged decision of the Board nonfinal and thus deprives the courts of appeals of the authority to entertain a petition for review of that

decision. *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992); *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984). That question is jurisdictional, because 8 U.S.C. 1105a(c) provides that an order of deportation "shall not be reviewed by any court" until the requisite administrative remedies have been exhausted. This Court accordingly would need to resolve that issue before reaching the merits of the question presented by petitioner.

Given the importance of the jurisdictional question, the Court may wish to address that issue in a case where the parties have adverse positions on the issue.[3] Because both parties in this case agree with the court of appeals' resolution of the jurisdictional question, this case does not offer the best opportunity to consider that question.

2. Petitioner renews his claim (Pet. 7-27) that the Board deprived him of due process by taking official notice of the change in Nicaragua's government without giving him advance notice. We disagree.

a. Petitioner does not suggest that the Due Process Clause bars courts or administrative agencies from taking official notice of facts that could not reasonably be disputed by the parties, such as a change of government

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[3] Although the parties in this case (like the parties in the Eleventh Circuit's recent contrary decision in *Fleary*, 950 F.2d at 712), both argue that a motion to reopen does not deprive the challenged order of deportation of finality, it is not unusual for an individual subject to deportation to take the opposite view. For example, an individual has an interest in supporting the opposite view if he wishes to file a single petition for review after the Board's action on the motion to reopen. See, *e.g.*, *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474-1475 (9th Cir. 1983) (accepting such an argument made by an individual subject to deportation). Under the Seventh Circuit's view, the time for challenging the initial order of deportation might well have expired before the Board acted on the motion to reopen, which would bar the alien from challenging the original order at that time.

in another country. His argument is limited to the contention that the Due Process Clause requires the decisionmaker to adopt procedures that give the litigant advance notice of its intention to notice the facts in question. But nothing in the Due Process Clause can support the notion that the Due Process Clause places such a tight constraint on how agencies and courts conduct their affairs. As the Seventh and D.C. Circuits have held, so long as the litigant receives a fair opportunity to rebut officially noticed facts, the Due Process Clause does not require a decisionmaker to give advance notice that it intends to notice such facts. See *Gutierrez-Rogue* v. *INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Kaczmarczyk* v. *INS*, 933 F.2d 588, 596-597 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991); cf. *Opp Cotton Mills, Inc.* v. *Administrator of Wage and Hour Division*, 312 U.S. 126, 152-153 (1941) ("The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.").[4]

Petitioner in this case received a fair opportunity to rebut the facts noticed by the Board in its decision. He filed a motion to reopen, submitting evidence that he contended would demonstrate that the Board's original determination was in error. The Board reviewed that evidence and concluded—on the merits—that the evidence was inadequate to establish the fear of persecution necessary for petitioner to be eligible for asylum or withholding of deportation. That decision is subject to

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[4] This Court has taken judicial notice of facts repeatedly, without any indication that it has given the parties prior notice of its intent to do so. See, *e.g.*, *Whitmore* v. *Arkansas*, 495 U.S. 149, 159 (1990); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 338 (1985); *id.* at 357 (Brennan, J., concurring in part and dissenting in part); *United Steelworkers* v. *Weber*, 443 U.S. 193, 198 n.1 (1979).

review in the court of appeals under 8 U.S.C. 1105a(a) (1988 & Supp. III 1991). Accordingly, petitioner is in substantially the same position he would have been in if the Board had given him advance notice and considered his evidence at the time of its original decision. Due process requires nothing more.

b. Petitioner correctly states that the Ninth Circuit in *Castillo-Villagra* v. *INS*, 972 F.2d 1017 (1992), rejected the views of the Seventh and D.C. Circuits, and adopted a more limited view of the Board's authority in this area. *Id.* at 1029-1031.[5] In our view, however, the tension among those decisions does not warrant review in this case for several reasons. First, as noted above, the present case involves a substantial jurisdictional question that the parties did not brief in the lower court and as to which the parties would not offer an adversary presentation in this Court.

Second, whatever the merits of the view taken by the Ninth Circuit, this case does not offer a suitable occasion to consider the due process problem, because it is clear that there has been no due process violation on the facts of this case. Although petitioner argues (Pet. 13-14) that a litigant would be deprived of due process if the Board denied a motion to reopen without actually considering evidence proffered to rebut officially noticed facts, the record in this case reveals no such occurrence. On the contrary, the Board considered the evidence proffered by petitioner and found it inadequate to justify relief. Pet. App. A48-A51.[6] Petitioner also suggests (Pet.

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[5] The Sixth Circuit has taken a similar position in an unpublished decision. *Ulloa* v. *INS*, No. 91-3028 (Sept. 17, 1991), *reprinted at* Pet. App. A52-A56. Under Sixth Circuit Local Rule 24(c), that opinion has only limited precedential force. See Pet. App. A52.

[6] Petitioner also suggests (Pet. 7, 15, 19) that the procedures approved by the Seventh Circuit in this case violate the Due

19-21) that requiring him to proceed by a motion to reopen deprives him of due process by exposing him to an unreasonable risk of deportation, because a motion to reopen, unlike a petition for review, does not entitle him to an automatic stay of deportation.[7] But petitioner was not exposed to such a risk in this case, because the court of appeals withheld its mandate pending disposition of this petition for certiorari, so that petitioner was protected by a stay for the entire period until the Board disposed of his motion to reopen; at that time, petitioner again became entitled to a new stay under 8 U.S.C. 1105a(a)(3) pending disposition of his petition for review of the

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Process Clause by subjecting him to the "abuse of discretion" standard of review appropriate for motions to reopen, rather than the arguably more favorable "substantial evidence" standard appropriate for final orders of deportation. Putting to one side the obvious fact that petitioner offers no basis for concluding that the Due Process Clause entitles him to the "substantial evidence" standard of review in this context, it is not at all clear that the court of appeals will consider his challenge to the Board's denial of his motion to reopen under a standard significantly more onerous than the standard under which it considered his challenge to the original order of deportation. Although petitioner is correct in stating that the two standards are different in the abstract, he does not explain why application of the "abuse of discretion" standard would make a difference in this case. In any event, to the extent petitioner's claim rests on that problem, it is decidedly premature. The nature of the court of appeals' appellate review will be clarified when the court of appeals disposes of the petition for review of the Board's denial of petitioner's motion to reopen. Any due process claim founded on a less demanding standard of review evidenced by that decision could be considered at that time.

[7] We note that the statute also does not grant an automatic stay to an individual who files a petition for review if the individual has been convicted of an aggravated felony. 8 U.S.C. 1105a(a)(3) (1988 & Supp. III 1991).

decision of the Board denying his motion to reopen.[8] In sum, we doubt seriously that the Ninth Circuit would have found a deprivation of due process in a case like this one, where the Board's disposition of the motion to reopen has dissipated the matters of concern to the Ninth Circuit.

Third, we do not believe that the disagreement among the courts of appeals has reached the point where review by this Court is necessary. All of the courts of appeals that have considered the question agree that the Due Process Clause requires that the litigant have "an opportunity to rebut officially noticed facts." *Castillo-Villagra*, 972 F.2d at 1029 (quoting *Kaczmarczyk*, 933 F.2d at 596); *Gutierrez-Rogue*, 954 F.2d at 773 ("due process guarantees an asylum applicant the right to challenge an officially noticed fact"). The principal basis for the Ninth Circuit's unwillingness in *Castillo-Villagra* to find the motion to reopen procedures adequate was its view that it was not fair to presume, as the Seventh and D.C. Circuits have, that the Board will "exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Castillo-Villagra*, 972 F.2d at 1030

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[8] In any event, both the Seventh and D.C. Circuits have made clear in concluding that due process permits the Board to allow rebuttal of noticed facts under motions to reopen that they "presume that when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Gutierrez-Rogue*, 954 F.2d at 773 (quoting *Kaczmarczyk*, 933 F.2d at 597 n.9). If the Board chose not to exercise its discretion in that manner, a litigant who has filed such a motion in good faith would be entitled to judicial review in the district court by means of habeas corpus of any refusal by INS to stay deportation in the district court, see 8 U.S.C. 1105a(a)(10) (Supp. III 1991), and, in the government's view, would be entitled to a stay.

(quoting *Kaczmarczyk*, 933 F.2d at 597 n.9).[9] As discussed in note 8, *supra*, both the Seventh and the D.C. Circuits have stated that they would find it inappropriate for the Board to allow execution of an order of deportation during the pendency of such a motion. There is every reason to believe that the federal courts in those circuits would enforce that view by granting a stay if the Board did not. The practical difference between the rules of the various circuits therefore is quite minimal at this time. If subsequent developments cause a difference in the actual relief afforded to individual litigants, review then might be warranted. This petition, however, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1993

[9] The unpublished decision of the Sixth Circuit in *Ulloa* relied heavily on the same point. Pet. App. A56 n.1.